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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-811

CLAIBORNE HARDWARE CO., et al.,
Petitioners,

versus

AARON HENRY, et al., UNITED STATES OF AMERICA, and MISSISSIPPI ACTION FOR PROGRESS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

Table of Authorities iv

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Constitutional Provisions Involved 4

Statutory Provisions Involved 4

Statement of the Case 7

Reasons for Granting the Writ 10

I. THE ABSTENTION DOCTRINE ARTICULATED IN *YOUNGER v. HARRIS* AND ITS PROGENY PRECLUDES THE DISTRICT COURT FROM ENJOINING ENFORCEMENT OF THE STATE COURT JUDGMENT IN A CIVIL ACTION BETWEEN PRIVATE PARTIES IN WHICH THE STATE IS NOT A PARTY 11

II. MERE ENTRY OF AN ENFORCEABLE STATE COURT JUDGMENT, FROM WHICH APPEAL LIES AS A MATTER OF RIGHT IS NOT "STATE ACTION" FOR PURPOSES OF THE FOURTEENTH AMENDMENT OR 42 U.S.C. §1983 16

TABLE OF CONTENTS (Continued)

Page

III. AN ORIGINAL COMPLAINT CANNOT "ARISE" TO CONFER OR CONTINUE JURISDICTION ON A FEDERAL COURT WHEN AN AMENDED COMPLAINT, WHICH SUPERSEDED THE ORIGINAL COMPLAINT, IS DISMISSED 22

IV. THE UNITED STATES OF AMERICA CANNOT CLAIM A LIEN INTEREST IN THE ASSETS OF A PRIVATE NONPROFIT CORPORATION THAT IS NOT A FEDERAL AGENCY, ALTHOUGH ITS ASSETS COME FROM A FEDERAL AGENCY 26

CONCLUSION 27

APPENDIX —

Opinion of Fifth Circuit Court of Appeals reported at 595 F.2d 291 ..... 1a

Accompanying Judgment dated May 21, 1979 ..... 42a

Letter dated August 6, 1979 denying Petition for Rehearing En Banc in United States Court of Appeal 44a

Opinion of District Court for the Northern District of Mississippi reported at 424 F.Supp. 633 ..... 46a

TABLE OF CONTENTS (Continued)

Page

Order of United States District Court for the Northern District of Mississippi - Delta Division, No. DC 69-58-S, dated October 20, 1976 ..... 58a

Order of United States District Court for the Northern District of Mississippi - Delta Division, No. DC 69-58-S, dated October 20, 1976 ..... 62a

Order of United States District Court for the Northern District of Mississippi - Delta Division, No. DC 69-58-S, dated October 20, 1976 ..... 65a

Judgment of Supreme Court of the United States dated March 27, 1972 denying Petition for Writ of Certiorari 67a

Supreme Court of the United States Judgment dated May 30, 1972 denying Petition for Rehearing 68a

Opinion of Fifth Circuit Court of Appeals reported at 444 F.2d 1300 ..... 69a

United States District Court, Northern District of Mississippi, Delta Division, Preliminary Injunction dated December 15, 1969..... 96a

Opinion of United States District Court for the Northern District of Mississippi reported at 50 F.R.D. 251 ..... 102a

List of Individual Defendants 146a

TABLE OF AUTHORITIES

CASES: Page

Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975) 13

Anonymous v. Association of the Bar, 515 F.2d 427 (2nd Cir. 1975), cert. denied, 423 U.S. 863 (1975) 12

Anonymous J. v. Bar Association, 515 F.2d 435 (2nd Cir. 1975), cert. denied, 423 U.S. 840 (1975) 12

Baer v. Baer, 450 F.Supp. 481 (N.D. Cal. 1978) 21

Borel v. U.S. Casualty Co., 233 F.2d 385 (5th Cir. 1956) 25

Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972), stay denied, 409 U.S. 1201 (1972) 13

Diaz v. Stathis, 576 F.2d 9 (1st Cir. 1978) 11

Douglas v. City of Jeanette, 319 U.S. 157 (1943) 21

Douglas-Guardian Warehouse Corp. v. Posey, 486 F.2d 739 (10th Cir. 1973) 13

Dubose v. Harris, 434 F.Supp. 227 (D. Conn. 1977) 25

Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), cert. denied, 415 U.S. 978 (1974) 13

Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978) ..12

TABLE OF AUTHORITIES (Continued)

Page

Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir. 1972), cert. denied, 409 U.S. 889 (1972) 12

Fallis v. Dunbar, 532 F.2d 1061 (6th Cir. 1976) ..19

Friedman v. Beame, 558 F.2d 1107 (2nd Cir. 1977) 12

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 11,17,18,20

Fuentes v. Shevin, 407 U.S. 67 (1972) 13

Gibson v. Berryhill, 411 U.S. 564 (1973) 14

Gravitt v. Southwestern Bell Telephone Co., 396 F.Supp. 948, motion granted 416 F.Supp. 830, appeal after remand 430 U.S. 723 (1977) 25

Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973) 13

Henry v. First National Bank of Clarksdale, 50 F.R.D. 251 (N.D. Miss. 1970) 2

Henry v. First National Bank of Clarksdale, 444 F.2d 1300 (5th Cir. 1971), cert. denied, 405 U.S. 1019 (1972) 2,8,23-24

Henry v. First National Bank of Clarksdale, 424 F.Supp. 633 (N.D. Miss. 1976) 2,9

Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), rehearing denied, No. 76-4200 (5th Cir. Aug. 6, 1979) ... 2,14, 16,26

TABLE OF AUTHORITIES (Continued)

Page

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 12,13,14,15,17

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 18

Johnson v. Kelley, 583 F.2d 1242 (3rd Cir. 1978)... 12

Juidice v. Vail, 430 U.S. 327 (1972) 3,10,14,15,16

Kahn v. Shainswit, 414 F.Supp. 1064 (S.D.N.Y. 1976) 12

Kurek v. Pleasure Driveway & Park District, 574 F.2d 892 (7th Cir. 1978), cert. denied, ____ U.S. ____, 59 L.Ed.2d 57, 99 S.Ct. 873 (1979) 17

Lamb Enterprises, Inc. v. Kiroff, 549 F.2d 1052 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977) 13

Louisville Area Inter-Faith Committee v. Nottingham Liquors, Ltd., 542 F.2d 652 (6th Cir. 1976) 13

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 13

Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974) 12

Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884) 23

Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668 (5th Cir. 1978) 23

TABLE OF AUTHORITIES (Continued)

Page

Matter of Establishment Inspection, Etc., 589 F.2d 1335 (7th Cir. 1979) (U.S. Appeal Pending) 23

Moore v. Sims, ____ U.S. ____, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979) 13,14

Morial v. Judiciary Commission of State of Louisiana, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978) 12

New Jersey Education Association v. Burke, 579 F.2d 764 (3rd Cir. 1978), cert. denied, ____ U.S. ____, 58 L.Ed.2d 239, 99 S.Ct. 252 (1978) 12

New York Times v. Sullivan, 376 U.S. 254 (1964) 18,19,20,21

Pierson v. Ray, 386 U.S. 547 (1967) 21

Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598 (5th Cir. 1945) 25

Puerto Rico International Airlines v. Silva Recio, 520 F.2d 1342 (1st Cir. 1975) 11

Sappington v. Beckert, 48 U.S.L.W. 3235 21

Shelley v. Kraemer, 334 U.S. 1 (1948) .. 18,19,20,21

Stevens v. Frick, 372 F.2d 378 (2nd Cir. 1967), cert. denied, 387 U.S. 920 (1967) 21

Stivers v. Minnesota, 575 F.2d 200 (8th Cir. 1978), cert. denied, 99 S.Ct. 1043 (1979) 13

TABLE OF AUTHORITIES (Continued)

Page

United States v. Fort Sill Apache Tribe of the State of Oklahoma, 507 F.2d 861 (Ct. Cl. 1974) 25

Wichman v. United Disposal, Inc., 553 F.2d 1104 (8th Cir. 1977) 25

Williams v. Washington, 554 F.2d 369 (9th Cir. 1977) 13

Williams v. Williams, 532 F.2d 120 (8th Cir. 1976) 13

Younger v. Harris, 401 U.S. 37 (1971) 3,9,10,11, 12,13,14,15,16

STATUTES:

28 U.S.C.

§1292 4,5,24

§2283 5,9,22,25

42 U.S.C.

§1983 3,5,8,10,15,16,17,19,21

Miss. Code Ann. (1972)

§11-51-3 6,17,20

§11-51-31 6,7,17,20

TABLE OF AUTHORITIES (Continued)

Page

OTHER AUTHORITIES:

P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart & Wechsler's *The Federal Courts and the Federal System*, 835 (2d Ed. 1973) 23

71 C.J.S. Pleadings, §321(a) (1951) 23,25

61 Am. Jr. 2d Pleadings, §334 (1972) 25

Fed. R. Civ. P., 65(b) 26

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CLAIBORNE HARDWARE CO., et al.,
Petitioners,

versus

AARON HENRY, et al.,

UNITED STATES OF AMERICA, AND
MISSISSIPPI ACTION FOR PROGRESS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Claiborne Hardware Co., et al.,[1] respectfully pray that a Writ of Certiorari issue to

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1 CLAIBORNE HARDWARE COMPANY; Q. H. MCDANIEL JR., d/b/a McDaniel Pharmacy; JAMES E. HUDSON, GEORGE A. HUDSON and H. B. HUDSON, JR., d/b/a Hudson Brothers, trading as Piggly Wiggly Store and Hudson's Gift Shop; WADDY A. ABRAHAM, d/b/a Jitney Jungle; LOUIS N. ELLIS, Executor of the Will and Estate of Michael Ellis, Deceased; JOE ELLIS, MRS. BEN MULLEN and MISS ELLA MAE ELLIS, d/b/a George Ellis

review the erroneous judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 21, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 595 F.2d 291 and appears in the Appendix filed with this petition. The opinion of the District Court for the Northern District of Mississippi is reported at 424 F.Supp. 633, and appears in the Appendix.

Because reference to opinions in a companion case is necessary to ascertain the grounds of the opinion in this case, the prior judgments of this Court denying rehearing and denying certiorari are reported at 406 U.S. 963 and 405 U.S. 1019, respectively, and appear in the Appendix. The underlying opinion of the Court of Appeals is reported at 444 F.2d 1300 and the opinion below that is reported at 50 F.R.D. 251, both of which appear in the Appendix.

Food Store; LOUIS N. ELLIS, d/b/a Abe's Betty Jean and Port Gibson Trading Company; H. D. HARWELL, d/b/a Mack's Package Store; NORMAN N. ELLIS and BARBARA B. ELLIS, d/b/a Ellis Variety Store; W. H. HAY, d/b/a O.K. Cleaners and Shirt Laundry; MURAD NASIF and MILDRED NASIF, d/b/a M & M Super Store and Washateria; PORT GIBSON LUMBER AND SUPPLY COMPANY, INC.; CHARLES R. DOBBS, d/b/a Western Auto Associate Store; KELLY D. CONN, d/b/a Auto-Lec Associates Store No. 225; A & P SERVICE AND PARTS, INC.; Allen Motor Company, Inc.; DONALD-SEGREST FORD, INC.; and MRS. EDGAR A. MCCAA, d/b/a Town and Country.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on May 21, 1979. After being granted an extension, a timely petition for rehearing en banc was filed and subsequently denied on August 6, 1979. On October 22, 1979, Mr. Justice Powell signed an order extending the time for filing this petition for certiorari to and including November 25, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER THE DOCTRINE OF ABSTENTION ARTICULATED IN *YOUNGER V. HARRIS* AND EXTENDED TO CIVIL PROCEEDINGS IN *JUIDICE V. VAIL* PRECLUDED THE DISTRICT COURT FROM ISSUING AN INJUNCTION ENJOINING ENFORCEMENT OF A STATE COURT JUDGMENT IN A CIVIL ACTION BETWEEN PRIVATE PARTIES WHEN THE STATE IS NOT A PARTY TO THE SUIT?

2. WHETHER THE MERE ENTRY OF A STATE COURT JUDGMENT FROM WHICH AN APPEAL LIES AS A MATTER OF RIGHT CONSTITUTES "STATE ACTION" FOR PURPOSES OF THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983?

3. WHETHER AN ORIGINAL COMPLAINT CAN "ARISE" TO CONFER JURISDICTION ON A

FEDERAL COURT WHEN AN AMENDED COMPLAINT, WHICH SUPERSEDED THE ORIGINAL COMPLAINT, IS DISMISSED?

4. WHETHER THE UNITED STATES OF AMERICA CAN HAVE A LIEN INTEREST IN THE ASSETS OF A PRIVATE NONPROFIT CORPORATION THAT IS NOT A FEDERAL AGENCY?

CONSTITUTIONAL PROVISIONS INVOLVED

(U.S.C. Const. Amend. XIV §1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1292

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §2283.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Miss. Code Ann. §11-51-3 (1972).

An appeal may be taken to the supreme court from any final judgment of a circuit court in a civil case, not being a judgment by confession or from any final decree of the chancery court, not being by consent, by any of the parties or legal representatives of such parties; but such appeal shall operate as a supersedeas only when the party applying for the same shall comply with the terms hereinafter prescribed; and in no case shall such appeal be held to vacate the judgment or decree.

Miss. Code Ann. §11-51-31 (1972)

On appeal from any interlocutory decree, where the chancellor shall allow a supersedeas, and on appeal from a final decree of the chancery court, or the final judgment of a circuit court where the appellant shall desire a supersedeas, bond shall be given by the appellant, payable to the opposite party, with two (2) or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of one hundred twenty-five per cent (125%) of the amount of the decree or judgment appealed from, or one hundred twenty-five percent (125%) of the amount of the value of the property or other matter in controversy, to be determined by the officer granting the appeal, conditioned that the appellant will satisfy the judgment or decree complained of, and also such final judgment as may be made in the cause, and all costs, if the same be affirmed, and a

supersedeas shall not issue until such bond shall have been given. A supersedeas shall not be granted in any case pending in the supreme court, unless the party applying for it shall give bond as above required.

STATEMENT OF THE CASE

Petitioners are merchants who filed suit in a Mississippi court against numerous individuals, Mississippi Action for Progress and the National Association for the Advancement of Colored People seeking injunctive relief from a secondary boycott enforced by violence and damages for violations of State Anti-Trust Laws. The merchants also named as defendants some banks possessing funds belonging to the NAACP, which were attached.

Shortly after the State court action was filed several defendants (all of whom are hereinafter referred to as respondents, including the parties added later and named below) brought suit in federal district court seeking release of the attached funds. Respondents are the National Association for the Advancement of Colored People, Aaron Henry, Mississippi State Conference of the NAACP, Coahoma County Branch of the NAACP, and all individual defendants (App. pp. 146a through 147a)[2] found liable in the state court suit. Respondents sued pursuant to 42 U.S.C. §1983 and invoked the jurisdiction of the district court under 28 U.S.C. §§1331 and 1343(3). The district court entered

2 The abbreviation "App." refers to the Appendix filed with this petition.

its preliminary injunction (App. pp. 96a through 101a) enjoining the merchants from attaching the funds held by the banks.

An amended complaint was then filed in district court, on the same jurisdictional grounds, wherein the respondents sought to enjoin prosecution of the State court suit. Mississippi Action for Progress, a respondent here, was named as a defendant in that complaint but later was realigned with the respondents. The district court entered a preliminary injunction barring the State suit until the rights of the parties could be determined.

On appeal, the Fifth Circuit reversed the preliminary injunction for lack of subject matter jurisdiction holding that there is no "state action" under 42 U.S.C. §1983 or the Fourteenth Amendment where a state has simply held open its court to litigation by private parties. *Henry v. First National Bank of Clarksdale,* 444 F.2d 1300 (5th Cir. 1971), cert. denied 405 U.S. 1019 (1972), rehearing denied 406 U.S. 963 (1972). App. p. 69a through 96a.

After an eight-month trial, the State court rendered its opinion in favor of the petitioners. Based upon its findings of violent tortious actions by respondents, which not only damaged petitioners but created an atmosphere of fear in the area, it ordered injunctive relief against the violent secondary boycott, held the respondents, except the United States of America,

jointly and severally liable for damages in the total sum of $1,250,699.00, declared the funds in the banks to be the property of the NAACP and directed the banks to pay the funds to petitioners.

Shortly thereafter, the respondents filed a supplemental and amended complaint in the district court requesting injunctive relief prohibiting the petitioners from enforcing the State court judgment pending review by the State Supreme Court and, if necessary, the United States Supreme Court. Jurisdiction was invoked under 28 U.S.C. §§1331, 1343(3), 2001 and 2202 alleging a cause of action under the First, Fifth, Seventh and Eleventh Amendments to the Constitution and 42 U.S.C. §1981, *et seq.* Respondent, The United States of America, was allowed to intervene, invoking jurisdiction under 28 U.S.C. §1345, claiming a lien interest in the assets of Mississippi Action for Progress, one of the respondents. The district court entered three preliminary injunctions (App. pp. 58a through 66a) enjoining the petitioners from enforcing the State court judgment pending its appeal to the Mississippi Supreme Court, and, if necessary, to this Court. *Henry v. First National Bank of Clarksdale,* 424 F.Supp. 633 (N.D. Miss. 1976). App. pp. 46a through 57a.

On appeal, the Fifth Circuit held, *inter alia,* that (1) the district court had subject matter jurisdiction of the claims underlying its enjoinment of petitioners from enforcing the State judgment; (2) 28 U.S.C. §2283 did not prohibit issuance of the injunctions; (3) *Younger v.*

Harris, 401 U.S. 37 (1971), and its progeny did not require abstention by the district court and (4) the district court did not abuse its discretion in issuing the preliminary injunctions. 595 F.2d 291 (5th Cir. 1979). App. pp. 1a through 41a.

REASONS FOR GRANTING THE WRIT

This case presents a long awaited opportunity for this Court to determine the applicability of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) to purely civil cases. The state is not a party here; the parties disagree on whether or not an important state interest is involved.

The decision of the Court below, which refused to abstain, conflicts with this Court's decision in *Juidice v. Vail*, 420 U.S. 327 (1972) which applied *Younger's* abstention to a purely civil action. It is but one example of a general retreat from *Juidice* and foreshadows an improper trend in the law. It also illustrates the need for national guidance on the applicability of *Younger* to civil cases.

The decision of the Court of Appeals also raises substantial and unanswered questions which need to be settled regarding the jurisdiction of federal courts; in particular, whether or not the mere entry of a state court judgment constitutes "state action" for purposes of the Fourteenth Amendment or 42 U.S.C. §1983. The Court's decision that it does, not only conflicts with

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), but raises the specter of "state action" arising any time any court in the fifty states enters its judgment.

I.

The Abstention Doctrine Articulated in *Younger v. Harris* And Its Progeny Precluded The District Court From Enjoining Enforcement Of A State Court Judgment In A Civil Action Between Private Parties In Which The State Is Not A Party.

An issue of national importance that has evaded resolution by this Court is to what extent the principles of *Younger v. Harris*, 401 U.S. 37 (1971) apply to purely civil cases. After eight years, it is time for a decision and this case affords an excellent opportunity to enunciate comprehensive and much needed rules.

All ten circuits have been faced with post-*Younger* requests for intervention in state court civil proceedings. Their decisions reflect a reluctance to apply *Younger* to purely civil proceedings even though this Court has never forbidden it. The circuits have generally refused to apply *Younger* to civil proceedings unless the state is a party or an "important state interest" is involved.[3] The obvious important state interest here is the State's ability to enforce its judgments.

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3 First Circuit:
Diaz v. Stathis, 576 F.2d 9 (1978);
Puerto Rico International Airlines v. Silva Recio, 520 F.2d 1342 (1975).

From a policy standpoint, perhaps there is some argument to a federal court not abstaining, at least in the early stages of a state court civil suit, because (1) no administrative or executive resources of the state are committed to it and (2) any presumption that state authorities by and large act in good faith would not apply to private parties who could use the state's judicial machinery for harrassment purposes. At this stage, the affront to the state court would be minimal. But the picture changes as the state court becomes more involved. Duplication of effort becomes more serious and affront more likely as the state judge nears a decision on the constitutional claim the state court defendant would like to assert in federal court. When the state court has rendered a decision, as in this case, the affront is obvious. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975).

Second Circuit:
Kahn v. Shainswit, 414 F.Supp. 1064 (S.D.N.Y. 1976); See also *Friedman v. Beame*, 558 F.2d 1107 (1977);
Anonymous v. Association of the Bar, 515 F.2d 427 (1975), cert. denied, 423 U.S. 863 (1975);
Anonymous J. v. Bar Association, 515 F.2d 435 (1975), cert. denied, 423 U.S. 840 (1975);
Erdmann v. Stevens, 458 F.2d 1205 (1972), cert. denied, 409 U.S. 889 (1972).
Third Circuit:
New Jersey Education Association v. Burke, 579 F.2d 764 (1978) cert. denied, 58 L.Ed.2d 239, 99 S.Ct. 252 (1978);
Johnson v. Kelley, 583 F.2d 1242 (1978). (This position is not unanimous within the circuit. See dissent of Judge Aldisert, Id. at 1252 arguing for *Younger's* applicability to all civil proceedings.)
Fourth Circuit:
Lynch v. Snepp, 472 F.2d 769 (1973), cert. denied, 415 U.S. 983 (1974).
Fifth Circuit:
Ealy v. Littlejohn, 569 F.2d 219 (1978);
Morial v. Judiciary Commission of State of Louisiana, 565 F.2d 295 (1977);

A number of Supreme Court Justices favored an extension of *Younger* to civil cases. Justice Rehnquist's opinion in *Huffman* suggested that the Court had created a "civil counterpart" to *Younger*. Id. at 611. Justice White, joined by Chief Justice Burger and Justice Blackman, argued that *Younger* should be extended into the civil area in his dissents in *Fuentes v. Shevin*, 407 U.S. 67, 97-99 (1972), and *Lynch v. Household Finance Corp.*, 405 U.S. 538, 560-61 (1972). Now it has been extended, but how far?

Unquestionably, *Younger* is applicable to civil proceedings in which important state interests are involved. *Moore v. Sims*, ____U.S. ____, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979); *Huffman v. Pursue, Ltd.*, supra. The circumstances when a federal court need not stay its hand are where the district court finds a state proceeding

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Duke v. Texas, 477 F.2d 244 (1973), cert. denied, 415 U.S. 978 (1974).
Sixth Circuit:
Lamb Enterprises, Inc. v. Kiroff, 549 F.2d 1052 (1977), cert. denied 431 U.S. 968 (1977);
Louisville Area Inter-Faith Committee v. Nottingham Liquors, Ltd., 542 F.2d 652 (1976).
Seventh Circuit:
Cousins v. Wigoda, 463 F.2d 603 (1972) (Stevens, Circuit J.), stay denied 409 U.S. 1201 (1972);
Ahrensfeld v. Stephens, 528 F.2d 193 (1975).
Eighth Circuit:
Stivers v. Minnesota, 575 F.2d 200 (1978); cert. denied, 99 S.Ct. 1043 (1979);
Williams v. Williams, 532 F.2d 120 (1976).
Ninth Circuit:
Williams v. Washington, 554 F.2d 369 (1977);
Henkel v. Bradshaw, 483 F.2d 1386 (1973).
Tenth Circuit:
Douglas-Guardian Warehouse Corp. v. Posey, 486 F.2d 739 (1973).

motivated by a desire to harass, or conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Huffman v. Pursue, Ltd.*, supra, 420 U.S. at 611.

A federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in a state proceeding." *Juidice v. Vail*, 430 U.S. 327, 337 (1972) (emphasis in original); see, *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). In this case abstention is appropriate because the state law clearly does not bar the interposition of any constitutional claims, *Moore v. Sims*, supra, 60 L.Ed.2d at 1004-1005, which have been and are being raised in state court.

In upholding the injunctions, the Courts below abused their discretion and misconstrued the requisites of *Younger* abstention when they stated, "[a]s the [respondents] had exhausted all avenues of emergency state relief available to them, we conclude that the *Younger* doctrine did not require the federal district court to abstain from entertaining the suit and granting appropriate relief." *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 302 (5th Cir. 1979). App. pp. 20a-21a. A party may not avoid *Younger* by exhausting only emergency relief measures. A necessary concomitant of *Younger* is that a party must exhaust state appellate remedies before seeking relief in the district court, unless he can bring himself within one of the ex-

ceptions of *Younger*. *Huffman v. Pursue, Ltd.*, supra, 420 U.S. at 608. This case has no such exception because enforcement of the state court judgment can be stayed by respondents if they simply post a bond.

> "Virtually all of the ills at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such a dimension occurred at or before trial. Intervention at a later date is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts."

Id.

In *Juidice v. Vail*, the underlying state suit was not quasi-criminal in nature. This Court nevertheless held that the principles of *Younger* and *Huffman* mandated federal abstention in the subsequent §1983 action, 430 U.S. at 338-339, and it thereby extended those principles for the first time to civil proceedings beyond the narrow confines of the *Huffman* quasi-criminal factual setting. In thus expanding the doctrine of civil comity, this Court did not rely on the traditional reluctance of equity to interfere with the state criminal process, a rationale employed in both *Younger*, 401 U.S. at 43-44 and *Huffman*, 420 U.S. at 604-05. The Court, with Justice Rehnquist writing for the majority, justified federal abstention by relying on the more vital con-

siderations of federalism and comity, 430 U.S. at 338-339, thereby establishing those doctrines as independent bases for denying federal equitable relief. The significance of this step is clear. With the quasi-criminal rationale now an unessential element in applying *Younger* to civil cases, the foundation was laid in *Juidice* for the application of *Younger* to more, if not all, civil actions. As stated by Justice Brennan in his dissent, *Juidice* merely postpones the formal announcement that *Younger* will be extended to all civil cases. 430 U.S. at 345.

If indeed *Younger* extends to purely civil cases this Court needs to say so. Not only would its application effect a reversal here but, more importantly, it will provide guidance to federal courts throughout the United States when confronted with purely civil actions in which the applicability of *Younger* is raised.

II.

Mere Entry Of An Enforceable State Court Judgment From Which Appeal Lies As A Matter Of Right Is Not "State Action" For Purposes Of The Fourteenth Amendment Or 42 U.S.C. §1983.

The court below found "state action" in the prior state court judgment which was termed "immediately enforceable." *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 299 (5th Cir. 1979) App. p. 14a. However, appeal from that judgment lies as a matter of right

and a stay of execution is available by simply posting a supersedeas bond. Miss. Code Ann. §§11-51-3 and 11-51-31 (1972). The effect of the district court's injunctions forbidding execution of the judgment was to substitute the injunctions for the supersedeas bond and itself for a state appellate remedy. This Court has often held that a federal court should not substitute itself for state appellate remedies. *Huffman v. Pursue, Ltd.*, supra, 420 U.S. at 609; Compare, *Kurek v. Pleasure Driveway & Park District*, 574 F.2d 892 (7th Cir. 1978), cert. denied, ____ U.S. ____, 59 L.Ed.2d 57, 99 S.Ct. 873 (1979).

The finding of state action here directly conflicts with this Court's opinion in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), which held that there is no state action where private parties, pursuant to a state statute, act in a manner which the State permits, but does not compel, in an area which is not exclusively reserved to the State. Before a 1983 action can lie here, Respondents must establish not only that Petitioners acted under color of a challenged statute but also that their actions are properly attributable to the State of Mississippi. *Flagg Brothers, Inc. v. Brooks*, supra, 436 U.S. at 156. The State is not a party here nor can it be logically said that petitioners, whose act has been to file a lawsuit and obtain a judgment, have done any act attributable to the State.

A State is responsible for the act of a private party when the State, by its law, compels the act. *Flagg Brothers, Inc. v. Brooks,* supra, 436 U.S. at 164. "This Court, however, has never held that a State's mere acquiescence in a private action converts that action into action of the State. The Court rejected a similar argument in *Jackson* [*v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)] 419 U.S. at 357 . . ." Id.

Respondents have argued that the failure of the Mississippi courts to stay execution of the judgment pending appeal makes the judgment state action. Mere denial of judicial relief cannot convert a private act into a public one. This notion is completely contrary to the essential dichotomy between public and private acts. Id. at 165.

By finding state action, the decision of the courts below foreshadows an ominous trend in the law which must be prevented; otherwise, "state action" will arise whenever a judgment is rendered in any court of any state. This Court has never adopted such a broad scope of "state action" and to uphold the injunctions in this case would be to eradicate the essential dichotomy between public and private acts.

In finding state action, the courts below mistakenly relied on *Shelley v. Kraemer,* 334 U.S. 1 (1948) and *New York Times v. Sullivan,* 376 U.S. 254 (1964). The rules of those cases simply cannot be stretched to fit the facts of

this case; beyond that, their citation as percedent opens the door for their rules to be applied nationwide in a manner which endangers our system of federalism.

The Court in *Shelley* looked to the motive of the parties — which admittedly was discriminatory — thus making the state court privy to a discriminatory purpose. No such compelling facts exist in the present case as the Mississippi Courts have merely afforded a procedure by which the petitioners may protect their pecuniary and property interests without inquiry into their motives for bringing the suit.

A more important reason for limiting the rule in *Shelley* is the danger which the straining of that doctrine poses as a precedent. A logical extension of the doctrine would result in a federal cause of action whenever any state power is used by private persons where constitutionally protected rights are allegedly involved. It could logically apply where a proprietor seeks to remove a person from his private property because of what the person is doing or saying. Such an extension has so great an application to purely private actions as to be overbroad. Therefore, the mere entry of a judgment in a civil suit among private parties should not extend to the rule of *Shelley* within §1983. Cf. *Fallis v. Dunbar,* 532 F.2d 1061 (6th Cir. 1976) (eviction action in state court among private parties is not an action under color of law within §1983).

The test for "state action" given in *New York Times,* "is not the form in which state power has been applied but,

whatever the form, whether such power has in fact been exercised" 376 U.S. at 265. *New York Times*, then, is inapposite because there has been no state power exercised here. On the contrary, the case is proceeding to the Mississippi Supreme Court on appeal. "Indeed, the crux of Respondents' complaint is not that the State *has* acted but that it *refused* to act." *Flagg Brothers, Inc. v. Brooks*, supra, 436 U.S. at 166 (emphasis in original).

In concluding that the state court judgment was immediately enforceable the Court of Appeals relied heavily on the fact that, "appellate review may only be had by the posting of a supersedeas bond . . ." 595 F.2d 291, 299-300 (5th Cir. 1979). Finding that appeal was "so difficult," it concluded that the immediate enforcement of the judgment could not be prevented, pending appeal to the State Supreme Court, and cited *New York Times v. Sullivan*, supra and *Shelley v. Kraemer*, supra. In both of those cases, *after* appeal, a final judgment was involved. In this case, appeal lies as a matter of right. Contrary to one part of its own opinion, 595 F.2d at 299, 300, App. p. 15a the Court of Appeals recognized in another part, 595 F.2d at 296, App. p. 7a, the availability of appeal, including stay of execution, via Miss. Code Ann. §§11-51-3 and 11-51-31 (1972). (Stay of execution pending appeal upon posting a supersedeas bond). This, of course, obviates the need for an injunction by the district court since respondents have admitted financial ability to post a supersedeas bond.

Respondents have the right to appellate review after the judgment of the state court is entered. Such an appeal is in progress. There is no reason to believe the Mississippi courts, and if necessary this Court, cannot or will not protect respondents' constitutional rights. See, *Douglas v. City of Jeanette*, 319 U.S. 157, 165 (1943); *Stevens v. Frick*, 372 F.2d 378 (2 Cir. 1967), cert. denied, 387 U.S. 920 (1967).

With appeal available, *New York Times* and *Shelley* are inapposite. As contemplated by those cases, there is no "state action" here and the issuance of these injunctions was an abuse of discretion. Although respondents allege the petitioners acted "under color of law" to deprive them of constitutional rights, "it is well established that the fact that in the deprivation resort was had to courts of the state does not supply the necessary state action." *Baer v. Baer*, 450 F.Supp. 481, 486 (N.D. Cal. 1978).

Finally, respondents have named no public official as a defendant and have not alleged a conspiracy between or among any petitioners. A conspiracy is required under §1983 and it is well established that judges are absolutely immune from liability for acts done in the performance of their judicial functions. *Sappington v. Beckert* (D.C. Pa. 1979), appeal dismissed, 48 U.S.L.W. 3235; *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). Since there have been no allegations of conspiracy here, no jurisdiction can lie under §1983.

III.

A complaint was filed in the district court and an injunction was issued thereon. Contesting the district court's jurisdiction, an appeal was perfected to the Fifth Circuit. Thereafter, an amended complaint, which superseded the original complaint, was dismissed by the Court of Appeals, which also dismissed the appeal of the original complaint because of the presence of the intervening amended complaint. Petitioners, from the earliest stages of this proceeding, have contended that the dismissal of the amended complaint necessarily included dismissal of the original complaint and the injunction issued thereon. The question arises, then:

Whether An Original Complaint Can "Arise" To Confer Jurisdiction On A Federal Court When An Amended Complaint, Which Superseded The Original Complaint, Is Dismissed?

Beyond the fact that the injunctions in question are barred by 28 U.S.C. §2283, if this Court allows them to stand it will legitimize a precedent-setting error of exceptional public importance that distorts fundamental principles of civil procedure upon which every litigant in federal court must rely. It is simple "horn-book" law that an amended complaint supersedes an original complaint, especially so when the order allowing an amend-

ed complaint specifically so provides. 71 C.J.S., Pleadings §321(a) (1951). Without addressing this question, the Court of Appeals summarily decided that since the injunction issued upon the original complaint was never appealed, it was not before the Court and could not be questioned. Such action violates the rule of *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884), which states that it is incumbent on a court of the United States, whether trial or appellate, to dismiss an action whenever it appears that subject matter jurisdiction is lacking, and the court must do so *sua sponte* even if the parties have not brought the issue to the attention of the court. This is the first principle of federal jurisdiction, P. Bator, P. Mishkin, D. Shapior & H. Wechsler, Hart & Wechsler's *The Federal Courts and the Federal System*, 835 (2d Ed. 1973), and was recognized by the Fifth Circuit itself in *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 671-72 (5th Cir. 1978); but see *Matter of Establishment Inspection, etc.*, 589 F.2d 1335, 1344 (7th Cir. 1979) (U.S. Appeal Pending).

Even when the Fifth Circuit refused to consider the jurisdictional issue *sua sponte*, it should not be allowed to deny petitioners the right to contest jurisdiction and later hold the jurisdictional question to be beyond its reach because petitioners never contested it. In its first brush with this case the Fifth Circuit ruled that the district court's injunction of December 15, 1969, App. pp. 96a-101a, the fountainhead of jurisdiction for this case, was never appealed from and, therefore, was not before the Court then or now. *Henry v. First National Bank*

of Clarksdale, 444 F.2d 1300, 1305 (5th Cir. 1971). App. p. 77a. Yet prior to this, the Fifth Circuit refused petitioners' motion for leave to appeal the complaint underlying the injunction and now the Fifth Circuit upholds jurisdiction claiming no appeal was made. This Court should not condone such a "mouse trap."

Initially, Petitioners filed a motion to dismiss the original complaint in the district court. The district court denied the motion but permitted Petitioners to apply to the Court of Appeals for an interlocutory appeal pursuant to 28 U.S.C. §1292(b).

A panel entered its order (Claiborne Hardware Co., et al. v. Aaron Henry, et al., Misc. No. 1583) denying leave to appeal. One of the Judges specially concurring, stated, *"I concur in this order solely because of the presence of an intervening amended complaint."* (Emphasis added).

Subsequently, the district court entered its order, holding, *inter alia*, "The amended complaint heretofore filed herein by the parties plaintiff shall be and the same hereby is received and considered by the Court for all purposes as an amended complaint herein." On appeal, the Court of Appeals faulted petitioners for not appealing the injunction. The fact is that the attempted appeal of the original complaint would include any order or injunction issued thereon: "An interlocutory appeal carries with it all previous orders and rulings only to the extent that they are subsumed into the appealed

ruling." *Dubose v. Harris*, 434 F.Supp. 227, 231 (D. Conn. 1977); *United States v. Fort Sill Apache Tribe of the State of Oklahoma*, 507 F.2d 861, 864 (Ct. Cl. 1974).

Thus we have (1) an injunction which is moot upon the filing of an amended complaint, or (2) that same injunction relying on the amended complaint for jurisdiction which is dismissed along with the amended complaint or (3) the same as (2) except Petitioners *tried* to appeal and were denied leave. In any event, the district court had no jurisdiction to issue its injunctions in this case due to the bar of 28 U.S.C. §2283 because, quite simply, there was no order or injunction which made the injunctions here "necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283.

By filing an amended complaint respondents abandoned the original complaint. Compare *Borel v. U.S. Casualty Co.*, 233 F.2d 385 (5th Cir. 1956) with *Proctor and Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945); See generally, *Wichman v. United Disposal, Inc.*, 553 F.2d 1104 (8th Cir. 1977); *Gravitt v. Southwestern Bell Tel. Co.*, 396 F.Supp. 948, motion granted 416 F.Supp. 830, appeal after remand 430 U.S. 723, reh. denied 431 U.S. 975 (1977). An amended pleading ordinarily supersedes the prior pleading. 71 C.J.S. Pleadings §321(a) (1951). Neither the Court of Appeals nor the district court has power arbitrarily to order that the original complaint be restored, 61 Am. Jur. 2d Pleadings, §334, (1972), and then rely upon it to uphold jurisdiction. The

Fifth Circuit has sanctioned a departure so far from the accepted and usual course of judicial proceedings by the district court as to call for an exercise of this Court's power of supervision.

Finally, petitioners have consistently noted that no bond was posted by respondents for the December 15, 1969 injunction. Without such bond the injunction was never effective, Fed. R. Civ. P., 65(b), and the district court had no basis for issuing its injunctions here.

IV.

The United States Cannot Have A Lien Interest In The Assets Of A Private Nonprofit Corporation That Is Not A Federal Agency And Prevent Execution Upon Those Assets Under The Guise Of Governmental Immunity.

One of the respondents, Mississippi Action for Progress, (MAP) is a private nonprofit corporation. It is not a federal agency although most of its funding is through the federal government. MAP was one of the parties in the state court suit and was held jointly and severally liable with the other defendants.

The court below decided the United States had a property interest in MAP's assets sufficient to create an equitable lien which enjoys immunity from unconsented judicial process. *Henry v. First National Bank of Clarksdale,* 595 F.2d 291, 309 (5th Cir. 1979) App. pp. 38a-40a. This finding not only stretches the idea of governmental immunity to ridiculous ends, it creates a dangerous precedent for the proposition that so long as an entity receives some federal funding it cannot be sued without the government's permission. This is ludicrous and completely unsupported by apposite authority.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the erroneous judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Aaron HENRY et al.,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK
OF CLARKSDALE et al.,
Defendants-Appellants,

versus

MISSISSIPPI ACTION FOR PROGRESS, INC.,
Defendant-Appellee.

No. 76-4200.

United States Court of Appeals,
Fifth Circuit.

May 21, 1979.

Appeal from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge:

Serious questions of federalism are raised in this strongly contested Mississippi civil rights case, especially as concerns the right of a federal court, on constitutional grounds, to enjoin the execution of a judgment of a Mississippi state court. In this appeal we review the action of the federal district court in issuing three preliminary injunctive orders prohibiting the enforcement by state court plaintiffs of an injunction and damages award entered in a judgment of the Chancery Court of Hinds County, Mississippi pending review of the state court judgment by the Mississippi Supreme Court and, if necessary, by the United States Supreme Court. This dispute has been before the federal courts and the state courts of Mississippi intermittently for almost a decade. It is before us now for the second time.

The factual background to this extended litigation has been summarized in earlier reported decisions of this court and the district court. *See Henry v. First National Bank of Clarksdale,* N.D. Miss., 1970, 50 F.R.D. 251, *rev'd,* 5 Cir., 1971, 444 F.2d 1300, *cert. denied,* 405 U.S. 1019, 92 S.Ct. 1284, 31 L.Ed.2d 483 *reh. denied,* 406 U.S. 963, 92 S.Ct. 2057, 32 L.Ed.2d 351; *Henry v. First National Bank of Clarksdale,* N.D. Miss., 1976, 424 F.Supp. 633. The latter cited decision is the subject of the instant appeal.

The pertinent facts begin in 1966 when civil rights organizations and several black citizens in Claiborne County and Port Gibson, Mississippi organized a boy-

cott of white businesses in Claiborne County and Port Gibson to protest racial discrimination by the merchants and local public officials and to seek certain concessions concerning racial matters. The leaders of the boycott held public meetings and organized picketing, leafletting and solicitations to encourage black citizens to support the boycott. At times violence or threats of violence were employed to enforce the boycott and discourage black patronage of white merchants.

Procedural History

On or about October 31, 1969, after the boycott had been in effect several years, 23 white merchants in Port Gibson and Claiborne County filed suit in the Chancery Court of Hinds County against the National Association for the Advancement of Colored People (NAACP), a New York corporation, Mississippi Action for Progress (MAP), a federally-funded, nonprofit Mississippi corporation, and 146 individual defendants, seeking injunctive relief and $3.5 million in damages. Plaintiffs sought to enjoin the defendants from picketing or guarding white businesses, conducting a secondary boycott by applying economic pressure on businesses to seek concessions from public officials, asking, soliciting, threatening or coercing others to cease trading with white businesses, and otherwise restraining trade in violation of the laws of Mississippi. The state plaintiffs alleged that the boycott and the various activities undertaken in support thereof violated Mississippi's antitrust laws. The complaint also

named as parties defendant the First National Bank of Clarksdale and 55 other banks alleged to have in their possession funds of the national NAACP or of its branches and auxiliary offices in Mississippi. Plaintiffs sought to attach these funds pursuant to Mississippi statutes authorizing the attachment in chancery of the assets of a nonresident debtor. Miss.Code Ann. §§11-31-1 et seq. (1972). Soon after the filing of the complaint the clerk of Chancery Court issued writs of attachment to the defendant banks.

On November 7, 1969 the Mississippi State Conference of the NAACP (State Conference) and the Coahama Branch of the State Conference (Local Branch), on behalf of itself and all other local branches, brought suit in federal district court against the Bank of Clarksdale, the Coahama National Bank and the First National Bank of Clarksdale as representatives of all the defendant banks in the state action, seeking the release of funds sequestered pursuant to the state writs of attachment. The State Conference and the Local Branch alleged that, although they used the name NAACP, they were independent and autonomous organizations, residents of Mississippi, and that they were suffering irreparable harm from the attachment of their assets without notice or an opportunity to be heard in a state suit to which they were not parties. On motion by the First National Bank of Clarksdale, the district court ordered the state court plaintiffs joined as parties defendant in the federal suit as necessary and proper parties, and on December 15, 1969 the district

court entered a preliminary injunction which *inter alia* enjoined the state court plaintiffs "subject to final action of this court, from subjecting or causing to be subjected in any way funds of plaintiffs deposited in the defendant banks to attachment or other process causing plaintiffs to be deprived of the use of their funds." The state court plaintiffs, joined as defendants in this federal action, failed to appeal or otherwise challenge the injunction. *See Henry v. First National Bank of Clarksdale,* 5 Cir., 1971, 444 F.2d 1300, 1305-06 & nn. 4, 5, 6, 7, 8 & 9 *(Henry I).*

Also on December 15, 1969, the national NAACP moved to intervene as a party plaintiff in the federal court suit and the original federal plaintiffs moved to join MAP as a party defendant. In addition, the federal plaintiffs amended their complaint to expand significantly the issues in the case and the relief sought. Aaron Henry who originally appeared in his official capacity as president of the State Conference and the Local Branch now appeared individually and as the representative of the class of all individual defendants in the state court suit. The amended complaint sought generally to enjoin the state court plaintiffs from further prosecuting the state suit. The district court granted the NAACP's motion to intervene and the motion to join MAP and on June 9, 1970 the district court entered a preliminary injunction barring prosecution of the state suit by the state court plaintiffs "until the rights of the parties can be ascertained." 50 F.R.D. 251, 268.

On appeal this court reversed the district court's grant of the preliminary injunction because of lack of subject matter jurisdiction, holding that there is no state action for purposes of 42 U.S.C. §1983 or the Fourteenth Amendment where the state has simply held open its tribunals to litigation by private parties. The mere availability of a forum for the resolution of private conflicts does not clothe private litigants with the authority of the state. *Henry I, supra* at 1309. For purposes of finding the requisite state action, we distinguished the situation where private parties have merely brought an action in state court from the situation where a private party has procured a judgment and is able to enlist the power of the state on his behalf in enforcing the judgment. *See, e.g., New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Stevens v. Frick,* 2 Cir., 372 F.2d 378, *cert. denied,* 387 U.S. 920, 87 S.Ct. 2034, 18 L.Ed.2d 973 (1967). While reversing the district court's injunction of June 9 against further prosecution of the state suit, we made clear that the preliminary injunction entered December 15, 1969 barring interference with funds in the defendant banks was not under consideration in the appeal and that it remained in force pending further action by the district court. *Henry I, supra* at 1306.

Pursuant to this court's mandate the district court dissolved its injunction against prosecution of the state court suit and dismissed the amended complaint. The state court suit proceeded to trial in the Hinds County

Chancery Court on June 11, 1973; the trial took approximately eight months with the appearance of about 144 witnesses. On August 9, 1976 the Hinds County Chancellor rendered a lengthy opinion pursuant to which he entered on August 19 a decree and order granting injunctive relief against the continuation or enforcement of the boycott by the state court defendants, holding the defendants, NAACP, MAP, and various individuals, jointly and severally liable for damages and attorneys' fees in the amount of $1.25 million, finding that the funds in the Mississippi banks subject to writs of attachment in chancery were the property of the nonresident NAACP and directing the banks to pay the funds to the state court plaintiffs. *Claiborne Hardware, Inc. v. NAACP,* No. 78,353 (Miss.Ch.Ct. Aug. 9, 1976). In Mississippi, trial court judgments become executory immediately upon their entry, although execution of a judgment for damages may be stayed pending appeal to the appellate courts by the posting of a supersedeas bond in the amount of 125% of the judgment. *See* Miss.Code Ann. §11-51-31 (1972). The NAACP, MAP and the individual defendants moved the Chancery Court for a stay of execution or for a stay and supersedeas without bond or with reduced bond on September 24, 1976. The Chancellor denied the motion on September 30 and the Mississippi Supreme Court denied a similar motion for a stay on October 1.

On the same day that the Mississippi Supreme Court denied the motion for a stay, the NAACP, the State Conference, the Local Branch, and later the United

States as intervenor applied to the federal district court for a temporary restraining order and for a preliminary injunction, prohibiting the state court plaintiffs from enforcing or executing the Chancery Court's judgment pending review of that judgment by the Mississippi Supreme Court and, if necessary, the United States Supreme Court. *See Henry v. First National Bank of Clarksdale*, N.D.Miss., 1976, 424 F.Supp. 633. The federal plaintiffs filed a supplemental and amended complaint that raised essentially three kinds of allegations. First, the complaint alleged that the preliminary injunction entered December 15, 1969 against seizing the disputed funds in the various state banks was still in effect and that, notwithstanding the state court judgment, any attempt to seize those funds would directly contravene that injunction. Second, the United States claimed a full and complete equitable lien interest in all of MAP's funds and property derived from federal grants made exclusively to it for the purpose of operating the Headstart Program in Mississippi. The United States argued that no property interest of the United States can be subjected to judicial process without its consent and that injunctive relief was necessary to prevent the impending loss of United States property in MAP's hands to the state court plaintiffs.

Finally, the federal plaintiffs alleged that the Chancery Court's injunction and damages award prohibited and penalized constitutionally protected activities and that they would suffer irreparable harm from execution of the Chancery Court's judgment during the

pendency of the appeal to the Mississippi Supreme Court. Specifically, the plaintiffs argued that the Chancery Court could not properly enjoin the organization of a boycott to protest racial discrimination or the use of nonviolent and noncoercive picketing or solicitation in support thereof since rights of free speech and association are guaranteed by the First and Fourteenth Amendments; nor could the state court assess damages for the exercise of protected rights. The federal plaintiffs claimed that without equitable relief they would suffer immediate and irreparable harm: first, through the serious impairment of the free exercise of protected rights by the state injunction and second, in the serious financial difficulties attendant on satisfying the judgment or posting a supersedeas bond. The NAACP filed supporting affidavits asserting that the national organization was essentially bankrupt and that posting the bond, while possible, would entail the cessation of virtually all the NAACP's national activities.

In three orders dated October 20, 1976, the district court preliminarily enjoined the state court plaintiffs from taking any action to enforce the final decree of the Chancery Court against the NAACP or the other state defendants, from interfering in any way with the operation of the federally assisted program administered by MAP, and from seizing or interfering with the funds attached in the various state banks, pending the appeal of the state court judgment to the Mississippi Supreme Court. The district court required the fed-

eral plaintiffs to post bonds totaling $110,000 for the protection of any parties later found to have been wrongfully enjoined. On appeal, the successful state court plaintiffs who have been enjoined from enforcing or executing the state court judgment challenge the entry of each of the district court's orders. We affirm as to each of the orders.

The Issues

Appellants' numerous contentions on appeal, when viewed in the most favorable light, raise essentially four major issues with respect to each of the district court's orders. First, appellants challenge the district court's jurisdiction over the federal claims underlying each of the three orders. Second, they argue that the Anti-Injunction Act, 28 U.S.C. §2283 (1976), prohibits the orders enjoining the state plaintiffs' execution of the state court judgment. Third, they contend that principles of equity, comity and federalism require that the federal court abstain from exercising its jurisdiction in this case under the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Finally, appellants argue that the district court erred in concluding that the four requirements for entry of a preliminary injunction had been met for each of the orders. The requirements include the probability that the plaintiff will succeed on the merits of his claim, the necessity of an injunction to prevent irreparable harm to the plaintiff, the absence of serious harm to the party

enjoined, and the finding that the issuance of an injunction is in the public interest.[1]

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1 For the first time on appeal, appellants contend that principles of *res judicata* and collateral estoppel preclude consideration of certain aspects of the federal action by the district court. These matters are affirmative defenses which are considered waived if not pleaded in the trial court. *See* Rule 8(c), Fed.R.Civ.P., 28 U.S.C.; Wright, Miller & Cooper, Federal Practice and Procedure: Civil §§ 1270 & 1278 (1978). They will not be considered for the first time on appeal. *Guerra v. Manchester Terminal Corp.*, 5 Cir. 1974, 498 F.2d 641, 657 n.44, 658 n.47; *Dellums v. Powell*, 184 U.S. App.D.C. 275, 285 n.13, 1977, 566 F.2d 167, 177 n.13, *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146-47, 57 L.Ed.2d 1161 (1978); *Sartin v. Commissioner of Public Safety*, 8 Cir., 1976, 535 F.2d 430, 433; *Schramm v. Oakes*, 10 Cir., 1965, 352 F.2d 143. As appellants failed to present these issues in any fashion to the court below, we do not consider them here.

Even if appellants had raised these issues below, however, we have serious doubt that, in an action brought under section 1983, a party who has been involuntarily forced to litigate his federal constitutional issues in a state court would be precluded from raising those issues in a federal court. The Supreme Court has indicated that the preclusive effect of a state court decision on a subsequent suit under section 1983 remains an open question. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18, 95 S.Ct. 1200, 1209, 43 L.Ed.2d 482 (1975); *Ellis v. Dyson*, 421 U.S. 426, 440, 95 S.Ct. 1691, 1699, 44 L.Ed.2d 274 (1975) (Powell, J., dissenting); *Preiser v. Rodriguez*, 411 U.S. 475, 509 n.14, 93 S.Ct. 1827, 1847, 36 L.Ed.2d 439 (1973) (Brennan, J., dissenting); *Florida State Board of Dentistry v. Mack*, 401 U.S. 960, 91 S.Ct. 971, 28 L.Ed.2d 245 (1971) (Burger, Ch. J., & White, J., dissenting from a denial of certiorari). *Compare Montana v. United States*, ____ U.S. ____, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). The Supreme Court has, in several recent cases, declined to reach this question where the parties failed to raise it properly below. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 629 n.4, 97 S.Ct. 2881, 2886, 53 L.Ed.2d 1009 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-08 n.19, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975); *Sosna v. Iowa*, 419 U.S. 393, 397 n.3, 95 S.Ct. 553, 556, 42 L.Ed.2d 532 (1975); *cf. Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

The rigid application of principles of *res judicata* and collateral estoppel to section 1983 actions like this case would be particularly troublesome in that parties like the federal plaintiffs herein

Although there is substantial overlap in the relief afforded by the district court's three orders, the legal theories underlying each of the orders vary considerably. We, therefore, discuss each of the orders separately with respect to the above issues.

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could never obtain a hearing on their federal constitutional claims in a federal court. In a purely private action there is generally no state action for purposes of section 1983 prior to the entry of a judgment in a state court. *Henry I*, 444 F.2d at 1300. Where the only federal question in the litigation is the defendant's federal constitutional defense, unrelated to laws protecting racial equality, the defendant cannot remove the action to federal court either under the civil rights removal statute, 28 U.S.C. §1443, or under the general removal statute, 28 U.S.C. §1441. *City of Greenwood v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966); *Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966); *Johnson v. Mississippi*, 5 Cir., 1974, 488 F.2d 284, *aff'd*, 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121 (1975); *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936).

If the defendant is thereafter bound by the state court's decision regarding his federal claim, his only opportunity to obtain access to a federal forum would lie in the slim possibility of direct review to the United States Supreme Court under 28 U.S.C. §1257. Precluding an action under section 1983 in these narrow circumstances would effectively frustrate the congressional intent that section 1983 serve as a safeguard against the infringement of federally protected rights by a state's judiciary as well as by other branches of state government. *See Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

These concerns distinguish this case from decisions in this and other circuits holding that a party that voluntarily submits a federal claim to a state court is thereafter bound by the decision of the state court. *See, e.g., Cornwell v. Ferguson*, 5 Cir., 1977, 545 F.2d 1022; *Jennings v. Caddo Parish School Board*, 5 Cir., 1976, 531 F.2d 1331, *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976); *Brown v. Chastain*, 5 Cir., 1969, 416 F.2d 1012, *cert. denied*, 397 U.S. 951, 90 S.Ct. 976, 25 L.Ed.2d 134. *But see Brown v. Georgia Power Co.*, S.D.Ga., 1973, 371 F.Supp. 543, *aff'd*, 5 Cir., 1974, 491 F.2d 117, *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 65 (1974).

Discussion

I.

First, we consider the order generally enjoining the state court plaintiffs from enforcing the state Chancery Court's injunction and damage award pending review of the state court judgment by the Mississippi Supreme Court and, if necessary, by the United States Supreme Court. This is the broadest of the three orders and largely encompasses the relief embodied in the other two. It is the only order preventing enforcement of the state court's injunction against all picketing, persuading, soliciting or advising in support of the boycott and the only order generally delaying execution of the damages award against the NAACP and the individual defendants.

Appellants contend that the district court lacked subject matter jurisdiction over the constitutional claims underlying this order. This contention is without merit. The supplemental and amended complaint filed October 1, 1976 alleged that enforcement of the state court's judgment would infringe rights secured to the federal plaintiffs by the First and Fourteenth Amendments of the Constitution and by 42 U.S.C. §1983;[2] as

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2 42 U.S.C. §1983 provides:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

such it plainly stated a federal cause of action over which the district court had jurisdiction under 28 U.S.C. §§ 1331(a)[3] and 1343(3).[4] The requisite state action which we found absent in *Henry I* has since been supplied by entry of the state Chancery Court judgment which is immediately enforceable. The crucial difference between a private party who has merely filed a civil suit in a state forum and the successful litigant who possesses an immediately enforceable state judgment is that in the latter case the full power and authority of the state can be invoked on behalf of the litigant. It is this exercise of state power that provides state action for purposes of the Fourteenth Amendment and section 1983. *Henry I, supra.* In the ordinary case a state court judgment must have been approved by the highest court of the state before it becomes immediately enforceable. *See New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). The present case is unique, however, for several reasons.

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3 28 U.S.C. §1331(a) provides:

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

4 28 U.S.C. §1343(3) provides:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The injunction issued by the state Chancery Court is presently enforceable, and there can be no doubt that the state court plaintiffs can invoke the full power and authority of the state to enforce the injunction pending appeal. The damage award is a closer question, but we are convinced that the unique facts of this case justify our conclusion that the damage award is also immediately enforceable, even assuming the possibility of state appellate review. First, the damage award is essentially based on the underlying injunction. As we will demonstrate, *infra*, significant parts of the injunction are at odds with the First Amendment. Second, appellate review of the damage award may only be had by the posting of a supersedeas bond which would effectively bankrupt the NAACP. Under the circumstances, we conclude that under applicable state law appellate review of this case is made so difficult as to justify our conclusion that the state Chancery Court judgment is immediately enforceable.

Appellants next argue that the Anti-Injunction Act, 28 U.S.C. §2283 (1976), prohibited issuance of the district court's injunction delaying enforcement of the state court judgment by the state plaintiffs. Section 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Section 2283 applies to restraints on private parties as well as to those imposed directly on a state court. *Atlantic Coast Line Rail-*

road Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.,* 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 537 (1940).

This section, however, poses no bar to the order under consideration, for the order plainly falls within one of the statutory exceptions to section 2283. After carefully reviewing the history and policies underlying section 2283 the Supreme Court held in *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), that section 1983 satisfies the requirements of the first exception to section 2283 as an express congressional authorization to intervene in state court proceedings in order to protect federal rights. *See also Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977); *Trainor v. Hernandez,* 431 U.S. 434, 444-45 n.8, 97 S.Ct. 1911, 1918-19, 52 L.Ed.2d 486 (1977); *Joiner v. City of Dallas, Texas,* 5 Cir., 1974, 488 F.2d 519, 520; *American Radio Assoc. v. Mobile Steamship Assoc., Inc.,* 5 Cir., 1973, 483 F.2d 1, 6; *Palaio v. McAuliffe,* 5 Cir., 1972, 466 F.2d 1230, 1232 n.7. As the district court's first order was entered pursuant to a claim under section 1983 involving the deprivation of constitutional rights, section 2283 did not prohibit the issuance of this injunction.

Appellants argue that, even if section 2283 creates no absolute bar to entry of an injunction in this case, the district court should have abstained from exercising its jurisdiction under the doctrine articulated in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),

and its progeny. The applicability of the *Younger* abstention doctrine requires consideration entirely apart from the determination that section 2283 does not prohibit issuance of an injunction. *See Mitchum v. Foster,* 407 U.S. 225, 243, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972); *Trainor v. Hernandez,* 431 U.S. 434, 444-45 n.8, 97 S.Ct. 1911, 1918-19, 52 L.Ed.2d 486 (1977). Neither the Supreme Court nor this court has made the *Younger* doctrine generally applicable to all civil litigation and we decline the invitation to do so in this case.

In *Younger,* the Supreme Court held that a federal district court ought not enjoin a pending state criminal prosecution absent exceptional circumstances such as a prosecution brought in bad faith or for harassment, a prosecution under a statute flagrantly unconstitutional in all respects or other possibly extraordinary circumstances. *Younger v. Harris, supra,* 401 U.S. at 53-54, 91 S.Ct. at 755. This doctrine rests on the traditional reluctance of federal courts of equity to intervene in state criminal prosecutions and on the considerations of comity and federalism that must guide relations between state and federal courts. The Court explained the principle of comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44, 91 S.Ct. at 750.

While certain considerations of comity and federalism pertain to civil proceedings as well as to criminal prosecutions the Supreme Court thus far has declined to extend the *Younger* doctrine to all civil litigation. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607, 95 S.Ct. 1200, 1209, 43 L.Ed.2d 482 (1975); *Juidice v. Vail*, 430 U.S. 327, 336 n.13, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977); *Trainor v. Hernandez*, 431 U.S. 434, 44-45 n.8, 97 S.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977). In each instance where the Court has applied *Younger* principles to civil litigation, a state or a state official was engaged in advancing important state interests in the state courts, and intervention by the federal courts would have seriously impaired the pursuit of those interests.

In *Huffman*, the state brought a civil nuisance action against the owners of a movie theater that showed obscene films. The state could have chosen instead to bring a criminal proceeding against the owners. The Court concluded that paramount state interests akin to those implicated in a criminal prosecution were involved in this civil action "in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials," 420 U.S. at 604, 95 S.Ct. at 1208, and, accordingly, held that federal abstention was appropriate.

Similarly, in *Juidice*, the state enforced a contempt citation for failure to observe a court order to appear in court. In holding *Younger* principles applicable, the Court emphasized the state's strong interest in enforcing rules for the orderly administration of its judicial system. "A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. . . . The contempt power lies at the core of the administration of a State's judicial system . . . [F]ederal court interference with the State's contempt process is 'an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding.' " (citations omitted) 430 U.S. at 335-36, 97 S.Ct. at 1217.

Finally, in *Trainor* the Court found abstention indicated where the state initiated a civil proceeding for the recovery of monies fraudulently obtained from the state by a welfare recipient. The Court discussed the importance that the state as sovereign attached to the prosecution of the suit, stressing that the state could have initiated criminal proceedings to vindicate its interests and concluding that "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity." 431 U.S. at 444, 97 S.Ct. at 1918. Mr. Justice Blackmun's concurrence particularly emphasized the significance to be accorded the state sovereign's presence in the litigation. *Id.* at 448-49, 97 S.Ct. at 1920-21.

The instant case plainly differs from *Huffman*, *Juidice*, and *Trainor*. First, this case involves an exclusively

private dispute to which the state has never been a party either in the state or the federal proceedings. This does not represent a case where the state has undertaken the vindication of important state interests in a civil proceeding. To the extent that Mississippi has any interest in the instant litigation, it is the interest in providing and supervising state forums for the orderly resolution of private conflicts. The district court's order does not interfere with this state function.

This brings us to the second important distinction between the case under review and the *Younger* line of decisions: the narrow scope of the relief afforded the federal plaintiffs. The district court's order herein does not prohibit further proceedings in the state courts, but merely delays enforcement of the state Chancery Court's judgment until the Mississippi Supreme Court and, if necessary, the United States Supreme Court have had an opportunity to review the important constitutional issues presented in this case. The district court carefully limited its relief to preserving the federal plaintiffs (defendants in the state court suit) from certain irreparable injury during the pendency of the appeal, while not interfering with the normal progress of the state court case through the Mississippi appellate courts. Thus, the district court's order was considerably less intrusive and disruptive of state functions than the broader injunctions under consideration in *Younger* and its progeny.

As the federal plaintiffs had exhausted all avenues of emergency state relief available to them, we conclude

that the *Younger* doctrine did not require the federal district court to abstain from entertaining this suit and granting appropriate relief. Appellants have cited no decision of the Fifth Circuit indicating a contrary result. Indeed, those cases which have applied *Younger* principles in the civil context have involved instances where the state as sovereign employed proceedings akin to criminal actions to advance important state interests and are, thus, entirely consistent with the analysis we adopt today. *See Duke v. Texas*, 5 Cir., 1973, 477 F.2d 244, *cert. denied*, 415 U.S. 978, 94 S.Ct. 1565, 39 L.Ed.2d 874 (1974); *Palaio v. McAuliffe*, 5 Cir., 1972, 466 F.2d 1230.

Having concluded that the action of the district court was not barred either by the Anti-Injunction Act or by the *Younger* abstention doctrine, we now consider whether the requirements for entry of a preliminary injunction were satisfied. The standard for appellate review of a preliminary injunction is simply whether the district court abused its discretion in issuing the injunction; the reviewing court does not engage in the same plenary review that would be indicated on appeal of permanent relief. *Brown v. Chote*, 411 U.S. 452, 456-57, 93 S.Ct. 1732, 1735, 36 L.Ed.2d 420 (1973); *Morgan v. Fletcher*, 5 Cir., 1975, 518 F.2d 236, 239; *DiGiorgio v. Causey*, 5 Cir., 1973, 488 F.2d 527, 528; *Johnson v. Radford*, 5 Cir., 1971, 449 F.2d 115, 116.

There are four requirements for the issuance of a preliminary injunction: first, there must be a substan-

tial likelihood that the plaintiff will ultimately prevail on the merits of his claim; second, the injunction must be necessary to prevent irreparable injury; third, the threatened injury to the plaintiffs must outweigh the harm the injunction might do the defendants, and, fourth, entry of an injunction must be consistent with the public interest. *Morgan, supra* at 239; *Canal Authority v. Callaway*, 5 Cir., 1974, 489 F.2d 567, 572; *DiGiorgio, supra* at 529. We consider these requirements in order.

The federal plaintiffs have argued that the injunction and damages award entered by the state Chancery Court are unconstitutional in that they prohibit and penalize activity protected by the First Amendment. Before addressing the merits of plaintiffs' constitutional claim, we emphasize that appellate review by us in the circumstances of this case is limited to an inquiry into whether the district court could, without abusing its discretion, have found that the federal plaintiffs were likely to succeed on the merits of their claim. Beyond this determination we intimate no opinion regarding the ultimate merit of their contentions.

It is a cardinal principle of First Amendment law that restrictions on speech must be narrowly drawn so as not to restrain or cramp the exercise of protected rights. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101, 92 S.Ct. 2286, 2293, 33 L.Ed.2d 212; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84, 89 S.Ct. 347, 353, 21 L.Ed.2d 325 (1968); *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d

214 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231. Restraints on speech must be carefully tailored so as not to exceed the ambit of permissible regulation.

The boycott in this case was organized to protest racial discrimination by the merchants and city government of Port Gibson. The organizers of the boycott undertook a variety of activities including public speeches, private solicitations and picketing to encourage other members of the black community to support the boycott. There were several instances of violence or threats of violence by supporters of the boycott against black individuals who continued to patronize white businesses. Violence, threats, and other coercive activity, of course, enjoy no protection under the First Amendment, and the district court properly left undisturbed those aspects of the state Chancery Court's injunction prohibiting "physical violence, damage to any real or personal property, or obstructing the entrance to the place of business of any complainant."

The state court's injunction, however, was not limited to prohibiting acts or threats of violence but extended to every form of speech or activity designed to discourage for whatever reason anyone from trading with the businesses of the state plaintiffs.[5] This sort of

5 The state Chancery Court's decree reads in pertinent part:

E. The defendants, and each of them, and all persons confederating and cooperating with them be and they are hereby permanently enjoined from:

sweeping prohibition on speech and communication raises serious constitutional problems. Consistent with the views underlying its injunction, the state court assessed the state defendants for all damages suffered by the state plaintiffs during the period of the boycott which the court found attributable to the failure or refusal of black citizens to trade with the white businesses in anticipated numbers.

At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law.[6] This

1. Stationing guards, store watchers, enforcers, deacons, or black hats, or by whatever name such persons are called, at or near the business premises of the above named complainants.

2. Persuading, soliciting, advising, threatening, coercing, intimidating and restraining any person to withdraw and withhold his or her patronage or to cease trading with the above named complainants.

3. Blocking the streets and sidewalks near the business establishment of any complainant or obstructing the entrance to the place of business of any of the above named complainants.

4. Using physical violence against any person; inflicting damage to any real or personal property of any person; or using demeaning and obscene language to or about any person; by reason of such person continuing to patronize or trade with any of the above named complainants.

5. Combining or colluding to interfere with the business of another person or for the purpose of restraining or monopolizing trade and commerce.

6. Picketing or patroling the premises of any of the above named complainants for the reason that the Court finds that the picketing is to attain an object which is in violation of the laws and public policy of Mississippi, and has been conducted against and enmeshed in a background of violence.

6 The Chancery Court found that the organization of the boycott and the activities undertaken in support thereof violated Mississippi common law and statutes prohibiting illegal secondary boycotts, Miss. Code Ann. §97-23-85 (1972), restraints of trade, Miss. Code Ann. §75-21-1, et seq. (1972), and unlawful conspiracies, Miss. Code Ann. §97-1-1 (1972).

view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

In a closely analogous case, *Machesky v. Bizzell*, 5 Cir., 1969, 414 F.2d 283, which also involved a state injunction against picketing and other speech in support of a political boycott, we said:

> "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment." . . .
>
> The right to picket is not absolute. It must be "asserted within the limits of not unreasonably interfering with the rights of others to use the sidewalks and streets, to

have access to store entrances, and where conducted in such manner as not to deprive the public of police and fire protection." . . . These interests can, of course, be protected by state injunctions narrowly drawn. The injunction here, however, has not struck such a balance. It prohibits all picketing in the designated business areas of Greenwood, for whatever purpose and in whatever manner carried out. This overshoots the mark and the situation cannot be saved by *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 1941, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, a case premised on violence of an intensity and duration in no way present here, or at least on the record before the district court.

The injunction here in question goes even further than prohibiting protected picketing. It enjoins "loitering or congregating . . . to induce, persuade, or coerce any person or persons not to trade or to do other business with . . . Complainants. . . ." This, for aught else appearing, prohibits the distribution of leaflets or even speech directed toward the boycott effort.

We hold that the state court injunction here is unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public

> interests in the full dissemination of public expression on public issues. We hold also that where important public rights to full dissemination of expression on public issues are abridged by state court proceedings, . . . the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights.

Id. at 290-91 (citations omitted).

Machesky is fully consistent with other cases in which this court has demonstrated its sensitivity to the heightened First Amendment concerns implicated in picketing or boycotts in furtherance of important public issues as opposed to narrow economic interests. *See Kirkland v. Wallace,* 5 Cir., 1968, 403 F.2d 413; *Davis v. Francois,* 5 Cir., 1965, 395 F.2d 730; *Kelly v. Page,* 5 Cir., 1964, 335 F.2d 114; *see also Smith v. Grady,* 5 Cir., 1969, 411 F.2d 181; *Medrano v. Allee,* S.D.Tex., 1972, 347 F.Supp. 605, *aff'd in part and vacated in part on other grounds,* 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); *Cottonreader v. Johnson,* M.D.Ala., 1966, 252 F.Supp. 492.

This distinction has recently formed the basis for holding that the Sherman Act's prohibition against concerted refusals to deal does not reach boycotts that are intimately bound up with political speech and unrelated to any economic interests. *Missouri v. National Organization for Women,* W.D.Mo., 1979, 467 F.Supp. 289; *cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight,*

Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

Given the procedural posture of this case, we have no need and, hence, make no attempt to articulate a comprehensive scheme for reconciling a state's interest in regulating economic activity with the First Amendment's protection of political speech. On review of a preliminary injunction, we need only decide whether the district court could, without abusing its discretion, have concluded that the federal plaintiffs were likely to prevail ultimately on the merits of their First Amendment claims. The district court did not abuse its discretion on this issue.

The second requirement for a preliminary injunction is that the plaintiff will suffer irreparable injury without the injunction. The district court found that the sweeping restrictions on speech and association embodied in the state Chancery Court's injunction would seriously impair the federal plaintiff's rights under the First Amendment, and that such restrictions in themselves constitute an irreparable injury. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Machesky v. Bizzell*, 5 Cir., 1969, 414 F.2d 283. In the circumstances of this case, the enforcement of this injunction could effectively paralyze all efforts by the NAACP and the individual federal plaintiffs to protest racial discrimination in Port Gibson and in Claiborne County.

With regard to the damages award, the district court found, on the basis of extensive affidavits and financial statements submitted by various national officials of the NAACP, that either the execution of the $1.25 million damage award or the posting of a $1.56 million supersedeas bond (as required by Mississippi law) would effectively bankrupt the national organization bringing all of its activities throughout the United States to an immediate and indefinite halt. In short, the NAACP's financial condition was so precarious that execution of the judgment or posting of the bond would have entailed the virtual disappearance of the NAACP as a functional entity.

MAP, which operates the Headstart Program in Mississippi, providing breakfasts and services to over 5,000 small children and employing over 1,000 persons, demonstrated by affidavit that payment of the state court judgment or posting of the bond would exhaust all of MAP's available assets and revenues, requiring the cessation of the Headstart Program in Mississippi. The individual state court defendants who are jointly and severally liable for the entire amount of the judgment would obviously lose all their assets and property if the judgment were executed against them. In these circumstances, we discern no abuse of discretion in the district court's finding of irreparable injury.

The third requirement for entry of a preliminary injunction is that the prospective harm to the plaintiffs must outweigh the injury to the defendants caused by

the injunction. In this case the state court judgment is earning interest at the lawful rate during the pendency of the appeal in the Mississippi courts and the district court ordered the federal plaintiffs to post a bond in the amount of $110,000 to protect the federal defendants should they subsequently be found to have been wrongfully enjoined. The district court found these provisions adequate to the protection of the federal defendants' pecuniary interests. Given the NAACP's impaired financial condition in 1976, the district court found no heightened risk of insolvency attendant on delay. Further, as the district court's order permitted enforcement of those parts of the state court's injunction prohibiting violence, threats, or other coercion, the federal defendants are protected against any conduct by the federal plaintiffs lying outside the bounds of constitutional privilege. The district court did not abuse its discretion in concluding that the federal defendants would suffer no serious injury from issuance of the federal injunction.

Finally, the district court found that issuance of its injunction was in the public interest. We find no abuse of discretion here for it is well established that the public has a vital interest in the vigorous and free discussion of public issues. *See, e.g., Machesky v. Bizzell, supra.*

II.

We next consider the district court's order which reinforces and effectuates those parts of the preliminary injunction of December 15, 1969 enjoining the state

court plaintiffs from interfering with the funds claimed by the State Conference and Local Branches on deposit in the defendant state banks. Appellants have advanced a lengthy and elaborate argument designed to demonstrate either that the December 15 injunction never took effect due to the failure of the federal plaintiffs to post a necessary bond or that the December 15 injunction was necessarily dismissed when the injunction of June 9, 1970, along with the amended complaint of December 15, 1969 was dismissed for lack of subject matter jurisdiction pursuant to our decision in *Henry I.* These contentions are without merit.

First, the December 15 injunction required the posting of a bond by the federal plaintiffs only upon withdrawal of the funds on deposit in the state banks; those portions of the injunction barring interference with these funds by the federal defendants were in no way conditioned on the posting of a bond. Second, the court in *Henry I* took great pains to explain that the December 15 injunction was not at issue in that appeal and was, therefore, unaffected by our decision therein. *See Henry I,* 444 F.2d 1300, 1305-06 & nn. 4, 5, 6, 7, 8 & 9. After carefully distinguishing the December 15 injunction and the June 9 injunction, the court indicated that the federal defendants had never appealed the entry of the former injunction and that the discussion of the December 15 order had been

> for only two reasons: (1) to set the stage for our discussion of the June 9, 1970 order, and

> (2) to notify the parties that the December 15 interlocutory injunction against the attachments remains standing, pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim . . .. As we proceed to what really concerns us on this appeal, therefore, we understand that the Banks and the state court complainants are presently preliminarily enjoined from withholding or causing to be withheld . . . funds belonging to the original plaintiffs deposited in the defendant Banks.

Id. at 1306. In subsequently implementing this court's judgment by vacating the June 9 order, the district court specifically referred only to the amended complaint filed in December 1969, not to the original complaint filed in November 1969.

Appellants' present contention that the amended complaint of December 1969 in all respects superseded the original complaint of November 1969 so that dismissal of the former necessarily involved dismissal of the latter is contrary to the clear understanding of this court and the district court regarding the separate status of the complaints and the orders based thereon. *See Henry v. First National Bank of Clarksdale,* N.D. Miss., 1976, 424 F.Supp. 633, 636. There is no reason now for us to revise our earlier appreciation of the continued vitality of the December 15 injunction.

Given that the December 15 order has been uninterruptedly in force since its entry, the remaining issues concerning the issuance of the order in October 1976 are readily resolved. The district court clearly had continuing jurisdiction over the issues and parties originally involved in 1969. As the December 15 injunction has been continuously in effect since 1969, any attempt by the federal defendants to interfere with the funds in the state banks would plainly be in derogation of an outstanding order of the federal court. The subsequent finding by the state Chancery Court that the funds in the state banks belong to the national NAACP and the Chancery Court's order directing the banks to pay the funds over to the state court plaintiffs could not affect the prior order of the federal district court.

Section 2283, the Anti-Injunction Act, was no bar to the entry of the 1976 order in these circumstances. The section specifically permits stays of state court proceedings by a federal court "where necessary . . . to protect or effectuate its judgments." We conclude that in this case the December 15 preliminary injunction constitutes a judgment for purposes of this exception to the Anti-Injunction Act. *See Doe v. Ceci,* 7 Cir., 1975, 517 F.2d 1203, 1206-07; Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4226, at 347 (1978); *see also Swann v. Charlotte-Mecklenburg Board of Education,* 4 Cir., 1974, 501 F.2d 383; *Montgomery County Board of Education v. Shelton,* N.D.Miss., 1970, 327 F.Supp. 811. In explaining the purpose of this exception the Supreme Court has stated that "some federal injunc-

tive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line Rail Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970).

The failure at this juncture to enforce the December 15 preliminary injunction would unquestionably impair the district court's ability to resolve the issues underlying that injunction, for the state court judgment expressly authorizes the state court plaintiffs to execute the damages award against the funds which are the subject of the earlier federal dispute. Moreover, the state banks, defendants in both the federal and state actions, have been placed in the unacceptable position of being ordered by the state Chancery Court to do precisely what the federal injunction orders them not to do: pay the disputed funds over to the state court plaintiffs. The only satisfactory resolution of this unseemly tension lies in delaying execution of the state court judgment until the prior federal injunction has been removed.

There is no basis for federal abstention under the *Younger* doctrine or any other theory in these circumstances surrounding the entry of an order to protect an extant prior injunction of the federal court. The substantive merits of the December 15 injunction are not before us on the instant appeal. Accordingly, we conclude that the district court acted properly in entering the order in October 1976 preventing action in derogation of the December 15 injunction.

III.

Finally, we consider the order entered on behalf of the United States as intervenor enjoining the state court plaintiffs from executing the state court judgment against or otherwise interfering with the funds or property in the possession of MAP received from the United States exclusively for the purpose of operating a Headstart Program in Mississippi. The United States petitioned to intervene in this case pursuant to Rule 24, Fed.R.Civ.P., 28 U.S.C.,[7] claiming that its property

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7 Rule 24 provides in pertinent part:

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

interest in all funds granted to MAP could not be subjected to judicial process in the Mississippi state courts without the consent of the United States. The district court allowed intervention and granted preliminary relief.

Before addressing the merits of the preliminary injunction, we decide several preliminary questions. First, the district court had jurisdiction under 28 U.S.C. §1345[8] over the claims of the United States in this action. Second, the district court committed no error in allowing the United States to intervene as a party plaintiff. Appellants' sole contention on appeal regarding the grant of the United States' application to intervene is that the application was not timely. The determination of the timeliness of a request to intervene rests within the sound discretion of the district court and will be disturbed on appeal only if there has been an abuse of discretion. *See, e.g., Stallworth v. Monsanto,* 5 Cir., 1977, 558 F.2d 257; *McDonald v. E. J. Lavino Co.,* 5 Cir., 1970, 430 F.2d 1065; *Smith Petroleum Service, Inc. v. Monsanto,* 5 Cir., 1970, 420 F.2d 1103; Wright, Miller & Cooper, Federal Practice and Procedure: Civil §1916 (1978).

There was no abuse of discretion. The United States moved to intervene in the federal court action on

8 28 U.S.C. §1345 provides:

§1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

October 7, 1976, a mere six days after the filing of the supplemental and amended complaint had initiated proceedings concerning the state Chancery Court's judgment and decree of August 19, 1976. The intervention by the United States caused no delay in the federal action or prejudice to the appellants.

Third, the Anti-Injunction Act, 28 U.S.C. §2283, does not apply when the United States seeks to stay proceedings in a state court. "The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings, except under the severe restrictions of 28 U.S.C. §2283, 28 U.S.C.A. §2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. §2283, 28 U.S.C.A. §2283, alone." *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 226, 77 S.Ct. 287, 291, 1 L.Ed.2d 267 (1957); *N.L.R.B. v. Nash-Finch Co.,* 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971); *N.L.R.B. v. Roywood Corp.,* 5 Cir., 1970, 429 F.2d 964.

Fourth, we reject appellants' contention that the issuance of this injunction by the district court was barred by the *Younger* doctrine. In our discussion of the district court's first order we explained our view that *Younger* principles do not control in the circumstances of this case, where neither the state nor important state interests are involved. Moreover, there is an additional consideration when the United States as sovereign is the party seeking injunctive relief in a federal

court. The same factors that militate against application of section 2283 to the national government also counsel against extension of the *Younger* doctrine to suits by the United States.

Having concluded that there was no bar to the entry of a preliminary injunction in favor of the United States, we now consider the injunction itself. As discussed above in our consideration of the first injunction, the standard of appellate review of a preliminary injunction is simply whether there has been an abuse of discretion by the district court. With regard to the four requirements for a preliminary injunction, the district court found, first, that the United States was likely to succeed on the merits of its claim. It is well established that a property interest of the United States cannot be subjected to judicial process without its consent. *Maricopa County v. Valley National Bank*, 318 U.S. 357, 362, 63 S.Ct. 587, 589, 87 L.Ed. 834 (1943); *United States v. Alabama*, 313 U.S. 274, 281-82, 61 S.Ct. 1011, 1014, 85 L.Ed. 1327 (1941). "A proceeding against property in which the United States has an interest is a suit against the United States." *Id.* at 282; 61 S.Ct. at 1014.

The only question, therefore, is whether the United States had a property interest in MAP's funds and property sufficient to invoke the above principle. The United States claimed an equitable lien in such funds and property. We find that the district court did not abuse its discretion in deciding that the United States was likely to succeed in its claim that it had an equit-

able interest in MAP's property and that this interest could not be subjected to state judicial process without the consent of the United States.

It is undisputed that virtually all of MAP's assets derive from grants made through the Department of Health, Education and Welfare under the Headstart-Follow Through Act, 42 U.S.C. §2928, *et seq.* (1976), and predecessor statutes authorizing funding for qualified Headstart Programs. The Act carefully delineates the purposes for which grant funds may be expended. Although MAP is a private, nonprofit corporation and not a federal agency, extensive and detailed regulations govern its expenditure of federal funds in order to ensure the use of grant funds for approved purposes. *See* 45 C.F.R. Part 74 (1977). The United States retains a reversionary interest in all grant funds and in all property purchased with such funds that can no longer be used for the narrow purposes specified in the Act and regulations. *Id.* A Headstart grantee must undergo an annual audit to determine whether it has spent grant funds in a fashion consistent with "applicable laws, regulations and directives." 45 C.F.R. §1301.3-3(a).

The district court could properly conclude that the United States' continuing interest in grant funds met the criteria for creation of an equitable lien. *See Avco Delta Corp. Canada Ltd. v. United States*, 7 Cir., 1973, 484 F.2d 692, 703, *cert. denied sub nom. Canadian Parkhill Pipe Stringing, Ltd. v. United States*, 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 490 (1974); *Citizens Co-Op Gin v. United States*, 5

Cir., 1970, 427 F.2d 692, 695; *Morrison Flying Service v. Deming National Bank*, 10 Cir., 1968, 404 F.2d 856, 861, *cert. denied*, 393 U.S. 1020, 89 S.Ct. 628, 21 L.Ed.2d 565 (1969). The equitable as well as the legal property interests of the United States enjoy immunity from unconsented judicial process. *See Blake Construction Co. v. American Vocational Assoc., Inc.*, 1969, 136 U.S.App.D.C. 6, 419 F.2d 308, and cases cited.

With regard to the other criteria for issuance of a preliminary injunction, the United States has adequately demonstrated that it would suffer irreparable harm from the destruction of its Headstart grantee in Mississippi. MAP provides food, medical and other services to roughly 5,000 needy children. Execution of the state damage award against MAP would effectively eliminate the Headstart Program in Mississippi for the year or longer it would take to establish a new grantee. Providing necessary aid to these children represents an important national policy which would be severely frustrated by execution of the state judgment. The district court did not abuse its discretion in finding that the important public interests implicated in the Headstart Program outweighed the interest of the state court plaintiffs in immediate execution of the state judgment against MAP.

Conclusion

Having carefully examined each of the preliminary injunctions entered by the district court and having

found that each satisfies the requirements for issuance of a preliminary injunction and that there exists no extrinsic bar to the entry of any of the injunctions, we affirm the district court as to each of the orders. We have also considered appellants' other contentions and find them without merit. The judgment is, therefore,

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4200

D.C. Docket No. CA-DC-69-58-S

AARON HENRY, ET AL.,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK
OF CLARKSDALE, ET AL.,
Defendants-Appellants,

versus

MISSISSIPPI ACTION FOR PROGRESS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the defendants-appellants pay to the plaintiffs-appellees and defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 21, 1979

ISSUED AS MANDATE: AUG. 14, 1979

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ BRENDA HAUCK
Deputy
New Orleans, Louisiana
Aug. 14, 1979

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 76-4200 — AARON HENRY, ET AL v. FIRST NATIONAL BANK OF CLARKSDALE, ET AL. v. MISSISSIPPI ACTION FOR PROGRESS, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Dixon L. Pyles
Mr. W. E. Gore, Jr.
Mr. Crane D. Kipp
Messrs. Robert E. Kopp
Neil H. Koslowe
Messrs. Nathaniel R. Jones
Charles E. Carter
Mr. Robert A. Murpy
Mr. Dennis J. Dimsey
Messrs. Allen R. Snyder
Benton R. Hammond
Vincent H. Cohen
Messrs. Thomas E. Royals
Robert H. Taylor, Jr.
Mr. H. M. Ray

Aaron HENRY et al.,
Plaintiffs,

versus

FIRST NATIONAL BANK
OF CLARKSDALE, et al.,
Defendants.

No. DC 69-58-S.

United States District Court,
N.D. Mississippi,
Delta Division.

Oct. 20, 1976.

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge.

This action is before the court on motions for preliminary injunctions filed herein by plaintiffs National Association for the Advancement of Colored People (NAACP), Mississippi State Conference of the National Association for the Advancement of Colored People (State Conference) and Coahoma County Branch of the National Association for the Advancement of Colored People (Coahoma Branch), and the United States of America, and intervenor herein.

Time will not permit the preparation of an exhaustive opinion. Consequently, the court will deal with only the most important issues.

A resume of the background of this litigation is necessary for an understanding of the court's findings and conclusions as herein expressed. This court and the United States Court of Appeals for the Fifth Circuit have published opinions which give a factual background of the case. These opinions are, therefore, made a part hereof in order to establish the history of the controversy between the parties. *Henry v. First National Bank of Clarksdale*, 50 F.R.D. 251 (N.D.Miss. 1970), *Henry v. First National Bank of Clarksdale*, 444 F.2d 1300 (5th Cir. 1971). The facts as set out in detail in both opinions are adopted by the court for the purpose of its findings and conclusions stated herein.

On the remand pursuant to the findings of the Fifth Circuit, an order was entered herein on June 14, 1972 vacating this court's injunctive order of June 9, 1970, and dismissing the amended complaint for lack of jurisdiction.

The state court complainants, defendants herein, contend that the entry of the order just above-mentioned deprives this court of jurisdiction of the action. The court does not agree. Judge Thornberry speaking for the Fifth Circuit following a discussion of this court's December 15, 1969 injunctive order and the part it played on the appeal, said:

To the extent that we have discussed the December 15 order, we have done so for only two reasons: (1) To set the stage for our discussion of the June 9, 1970 order, and (2) to notify the parties that the December 15 interlocutory injunction against the attachments remains standing, pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim that all their funds have been illegally attached without notice and hearing, pursuant to a Mississippi non-resident attachment statute, when these plaintiffs are in fact residents of the State of Mississippi and not even parties to the state civil suit, the filing of which generated the attachments. Cf., e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). As we proceed to what really concerns us on this appeal, therefore, we understand that the Banks and the state court complainants are presently preliminarily enjoined from withholding or causing to be withheld pursuant to writs of attachment issued in connection with Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, Mississippi, funds belonging to the original plaintiffs deposited in the defendant Banks.

444 F.2d 1306.

The issues created by the complaint and defendants' answer thereto have not been tried and no disposition has been made of the same. The injunctive order rendered by the court on December 15, 1969, is therefore in force and provides specifically as follows:

> Defendants herein, who are complainants in Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, are preliminarily enjoined, subject to final action of this court, from subjecting or causing to be subjected in any way funds of plaintiffs deposited in the defendant banks to attachment or other process causing plaintiffs to be deprived of the use of their funds.

The state court's final decree provided that the funds just mentioned had been properly attached in that proceedings as the property of the non-resident defendant NAACP and directed that the said Banks pay to the complainants in the state proceedings the funds which are the subject of this court's injunctive order.

It is apparent that any attempt by the state court complainants to enforce the decree of the state court and require the defendant banks to comply therewith would be a violation of this court's injunctive order of December 15, 1969. In order to protect and effectuate this court's said judgment the motion for preliminary injunction as regards said funds must be sustained, 28 U.S.C. §2283.

It may be well at this juncture to discuss the position of the state court complainants that the court is prohibited by Section 2283 from granting the preliminary injunction requested by the parties. The injunctive relief requested does not contemplate interference with the proceedings in the state court. The relief requested applies to the enforcement of the judgment by the individual state court complainants and extends only for that period necessary to permit an exhaustion of appellate remedies. The final decree of the state court is now the subject of review by the Supreme Court. The appeal has been perfected and the state court defendants have complied with the cost bond requirements fixed by the state court. The appeal will take its usual course through the state's appellate procedure and because of the complexity of the issues involved there will be several years involved in this process.

The state court complainants question the court's jurisdiction as a single-judge court, contending that since the case involves the constitutionality of a state statute and enforcement thereof, a court of three judges is required. 28 U.S.C. §2281. The court rejects this contention for two reasons. First, section 2281 has been repealed by an Act of Congress effective August 12, 1976. Public Law 94 381, 94th Congress, S. 537, 45 LW 1. Section 7, of the Act provides that it shall not apply to any action commenced on or before the date of enactment. While the action sub judice was originally commenced prior to the enactment of the law, the facts and circumstances giving rise to the filing of the amended complaint did not occur until after the effective date. The final decree of the state court awarding monetary and injunctive relief to the state court complainants was not ntered until August 19, 1976. The cause of action presented by the amended complaint herein did not come into existence until that time. Under such conditions Public Law 94-381 is fully applicable and a court of three judges is not authorized. Second, plaintiffs do not challenge the constitutionality of the supersedeas bond requirement of Section 11-51-31 Miss.Code 1972. Rather, they argue that enforcement of the state chancery court injunction and damage award, which prohibit and penalize both protected and unprotected activities, would irreparably abridge constitutionally protected rights. The court agrees with this contention. A three-judge court is not required.

The United States by its intervenor's complaint and accompanying motion, seeks to protect its interest in the funds and property of Mississippi Action for Progress, Inc., (MAP). This organization is a non-profit, tax exempt, corporation duly organized and existing pursuant to Mississippi law. MAP receives grants-in-aid from the Department of Health, Education and Welfare (HEW) pursuant to Title V of the Economic Opportunity and Community Partnership Act of 1974, 42 U.S.C. §2921, et seq., (Head Start Act) for the operation of a Head Start Program in Mississippi. The Head Start Act and regulations promulgated pursuant thereto, provide that title to all property purchased with grant funds is vested in the grantee solely for the purpose of enabling the grantee to carry out the

objective of the grant, i.e., operate a Head Start Program as authorized by the Head Start Act, 42 U.S.C. §2921, et seq. The United States has a full and complete lien interest in all funds and property purchased by MAP with funds advanced by HEW. In order to protect the interest of the United States in these funds and property, it is necessary to enjoin defendants from subjecting, in any way, such funds and property to the satisfaction of the state court's monetary awards. The objective of the Head Start Program would be curtailed, if not eliminated, if such injunctive relief is not granted.

The courts have long recognized and enforced the rule that no property interest of the United States can be subjected to judicial process without the consent of the sovereign. *United States v. Alabama*, 313 U.S. 274, 281, 61 S.Ct. 1011, 85 L.Ed. 1327 (1941), *Maricopa County v. Valley National Bank*, 318 U.S. 357, 362, 63 S.Ct. 587, 87 L.Ed. 834 (1943).

The United States is now threatened with immediate, irreparable harm as the result of pending enforcement of the state judgment against MAP. The court concludes that injunctive relief is appropriate. Security is not required of the United States, Rule 65(c) Fed.R.Civ.P.

Coming now to the consideration of the motion of the NAACP the Mississippi State Conference and Coa-

homa Branch for injunctive relief against the enforcement of the state decree, the court concludes that the motion is well taken and should be sustained.

The amended complaint and the injunctive relief granted plaintiffs against the prosecution of the state action in the first instance were the subjects of an appeal to the Fifth Circuit. *Henry v. Bank of Clarksdale*, 444 F.2d 1300 (1971). Judge Thornberry, speaking for the court reversed this court's decision to stay the state court proceedings and directed the dissolution of the injunction and dismissal of the amended complaint. Pursuant to the mandate issued by the Fifth Circuit, on June 14, 1972, this court entered an order dismissing the amended complaint and vacating its injunctive order of June 9, 1970.

Judge Thornberry's reversal was based upon a finding that the record under review did not reveal a "state action" to support the injunctive relief sought by plaintiffs. Judge Thornberry said

> Since we conclude that there is no "state action" to be found *in the mere filing of a private civil tort action in state court*, the district court's order of June 9, 1970, enjoining the prosecution of the pending state civil action should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction. [Emphasis supplied.] 444 F.2d at 1312.

As to the proposition that it is essential to civil rights jurisdiction that the deprivation of rights contested be "state action", Judge Thornberry made this observation

> The difficult problem has always been to pinpoint the boundary between state action and nonstate, or private action. In this case, we must decide on which side of the boundary *lies the mere commencement of a private tort suit in state court.* [Emphasis supplied.] 444 F.2d at 1308.

Other pertinent excerpts from Judge Thornberry's opinion are:

> To apply this test to the mere filing of a private civil complaint in a state court and conclude that "state action" results would be to demean the judicial process. It would be to forget that a court is an open forum before which each party is to have a full and fair opportunity to make his case. Only after both parties to a private civil action here had their day in court and the court has reached its decision and rendered its judgment does the full power of the state come into play in enforcing the judgment.
>
> * * * * * *
>
> At the time the court below issued its injunction, the Mississippi Chancery Court had made no dispositive determinations, factual or

> legal, on any of these difficult issues. In other words, the State, through its courts, had taken a stand on neither side of this very difficult controversy. 444 F.2d at 1310.

There has been a drastic change in circumstances since Judge Thornberry considered the sufficiency of the allegations expressed in the amended complaint. The parties have now had their day in the state trial court and the court has rendered its judgment. The plaintiffs have the right of appeal to the Mississippi Supreme Court and then, if necessary, to the Supreme Court of the United States. The state statutes, however, make it mandatory that a supersedeas bond be posted if execution and enforcement of the judgment is to be stayed during the appellate process. The parties have sought relief from the requirements of the bond statute in the trial court and in the Supreme Court, but to no avail. They have exhausted all state remedies in that regard. As the matter now stands, absent federal intervention, the plaintiffs must post the bond required by the Mississippi Statute or suffer the seizure and sale of their property. Should they be successful on appeal, their only recourse would be to pursue a claim against the judgment creditors for an unwarranted seizure and sale of their property. The state court complainants were not required to post bond in the state court attachment proceedings, and are not required to give security for any loss or damage which plaintiffs might suffer on account of the seizure and sale of the property, should the trial court's judgment be set aside or vacated on appeal.

The record reflects that plaintiffs will suffer immediate and irreparable harm if the enforcement of the state decree by defendants is not enjoined. To comply with the provisions of the decree enjoining protected rights will seriously impair their rights to free speech and association. This is in and of itself an irreparable injury. *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). While the record reflects that plaintiff NAACP can obtain funds to finance the procurement of a supersedeas bond, to accomplish this NAACP will be required to borrow a substantial portion of the amount of the bond and to deplete funds necessary to conduct its normal operations. To repay these sizeable loans the NAACP will have to curtail practically all of its usual functions during the pendency of appeal, shown to be a period of two or three years. Many current projects will have to be terminated and new projects cannot be commenced.

The granting of injunctive relief will not cause substantial harm to the defendants. The decree bears interest at the lawful rate from the date of its entry and there is no showing that a delay in enforcing the decree will result in a dissipation of the assets of plaintiffs now subject to levy. This problem, if it exists, can be alleviated by requiring an injunction bond in an appropriate amount.

The court finds the granting of the injunction to be in the public interest.

The court has concluded that the Mississippi statutes do not afford plaintiffs the due process required by law in the settlement of their controversy with defendants.

The existence of state action within the purview of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States can be determined only in the framework of the peculiar facts or circumstances of a case. *Burton v. Wilmington Parkway Authority*, 365 U.S. 715, 716, 81 S.Ct. 856, 857, 6 L.Ed.2d 45, 47 (headnote 7). Here in vindication of their rights, the state statutes impose such a burden on plaintiffs as to deprive them of rights guaranteed to them by the First Amendment to the Constitution of the United States. An injunction is essential to protect those rights.

The court will enter appropriate orders of injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

AARON HENRY, et al,
Plaintiffs,

versus NO. DC 69-58-S

FIRST NATIONAL BANK
OF CLARKSDALE, et al,
Defendants.

ORDER

October 20, 1976

This cause having come on to be heard on motion of the plaintiffs National Association for the Advancement of Colored People, Mississippi State Conference of the National Association for the Advancement of Colored People and Coahoma County Branch of the National Association for the Advancement of Colored People, for a preliminary injunction restraining the defendants from taking any action to enforce the final decree entered August 19, 1976, by the Chancery Court of the First Judicial District of Hinds County, Mississippi, in *Claiborne Hardware Company, et al, v. National Association for the Advancement of Colored People, et al,* Cause No. 78353, until said plaintiffs herein have fully exhausted all appeals to the Mississippi Supreme Court and, if necessary, to the United States Supreme Court, the court finds, in part, as follows:

1. That this court entered an injunction herein on December 15, 1969, preliminarily enjoining defendants herein, complainants in the state court proceedings aforesaid, from subjecting or causing to be subjected in any way funds of said plaintiffs Mississippi State Conference of the National Association for the Advancement of Colored People and Coahoma County Branch of the National Association for the Advancement of Colored People, deposited in the defendant banks to attachment or other process causing said plaintiffs to be deprived of the use of their funds;

2. That this court's said preliminary injunction has not been dissolved and is in full force and effect;

3. That defendants are the beneficiaries of certain monetary awards contained in the state court decree aforesaid, which contain the following provision:

> The funds attached by the writs of attachment in chancery in the hands of and under the control of the hereinafter named resident banks be and they are hereby declared to be the funds of the nonresident defendant NAACP. Each of the resident attachment defendant banks as set forth hereinafter, be and they are hereby directed to pay to the seventeen above-named complaints [defendants herein] to be applied toward the payment of damages, the following sums:

Attachment Defendants	*Amount of funds*
First National Bank, Jackson	$ 249.86
The First National Bank of Greenville	182.24
Bank of Cleveland	74.63
Commercial Bank, Woodville	171.48
Southern National Bank, Hattiesburg State Youth Conference NAACP	.33
Port Gibson Bank	247.59
Hancock Bank, Gulfport	151.92
Deposit Guaranty National Bank, Jackson Mechanics, Bank of McComb (branch bank)	7,955.03
Merchants & Farmers Bank, Meridian	98.04
Citizens Bank of Hattiesburg	693.82
First National Bank of Clarksdale	6,500.00

4. That any effort on the part of defendants to enforce the provisions of the state court decree with reference to the money on deposit in the above-mentioned banks will be violated of this court's aforesaid preliminary injunction;

5. That in order to effect this court's judgment and compel the obedience thereof, it is necessary that an injunction be issued restraining defendants from enforcing or allowing to be enforced, the above quoted provision of the state court decree.

It is, therefore, this 20th day of October, 1976, hereby

ORDERED that the defendants herein, complainants in the above-described state action, and each of them, their officers, agents, servants, employees, attorneys, and those in active concert or participation with them be restrained and enjoined from seizing, or in any way causing the funds in the banks aforesaid to be paid in accordance with the decree of the state court to said defendants.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

ORDER FOR SERVICE

The clerk is directed to serve, by United States Mail, Return Receipt Requested, a certified copy of the above and foregoing order upon all counsel of record, which service shall constitute notice to all parties of the issuance of the order.

This 20th day of October, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

AARON HENRY, et al,
Plaintiffs,

versus NO. DC 69-58-S

FIRST NATIONAL BANK
OF CLARKSDALE, et al,
Defendants.

ORDER

October 20, 1976

Upon consideration of the motion for a preliminary injunction filed herein by plaintiffs, the National Association for the Advancement of Colored People, the Mississippi State Conference of the National Association for the Advancement of Colored People, and the Coahoma Branch of the National Association for the Advancement of Colored People, the memoranda and affidavits filed in support thereof, the opposition thereto and the other submissions of the parties with respect to said motion, as well as oral arguments of counsel for the parties, it appearing to the court that said motion should be granted in order to avoid irreparable injury to the plaintiffs, it is hereby

ORDERED that defendants in this action and their officers, agents, servants, employees, and attorneys, and all persons authorized by law or otherwise to en-

force or execute judgments issued by the Chancery Court for the First Judicial District of Hinds County, be and they hereby are, restrained and enjoined pending determination of this action, from taking any action to enforce the final decree entered August 19, 1976, by the Chancery Court for the First Judicial District of Hinds County in *Claiborne Hardware Co., et al, v. National Association for the Advancement of Colored People, et al.* (Cause No. 78353), *provided, however,* that nothing in this order shall prohibit the enforcement of those provisions of the State Chancery Court's injunction prohibiting physical violence, damage to any real or personal property, or obstructing the entrance to the place of business of any complainant; it is further

ORDERED that the 45-day period for posting a supersedeas bond be extended until 48 hours following the dissolution or vacation of this preliminary injunction or any succeeding preliminary injunction issued herein; it is further

ORDERED that the plaintiffs aforesaid first give security in the sum of $100,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined, such bond to be approved by the court or by the clerk of the court, which said bond shall be in addition to the $10,000.00 bond previously posted pursuant to this court's order dated October 1, 1976, which shall be maintained in effect as security for the payment of such costs and damages above mentioned; and it is further

ORDERED that pursuant to Rules 23(b)(2) and 23(c)(1) of the Federal Rules of Civil Procedure, plaintiff NAACP may maintain this action as a class action on behalf of all individuals named as defendants in *Claiborne Hardware Co., et al, v. National Association for the Advancement of Colored People, et al* (Cause No. 78353).

Dated this 20th day of October, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

ORDER FOR SERVICE

The clerk is directed to serve, by United States Mail, Return Receipt Requested, a certified copy of the above and foregoing order upon all counsel of record, which service shall constitute notice to all parties of the issuance of the order.

This 20th day of October, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

AARON HENRY, et al,
Plaintiffs,

versus NO. DC 69-58-S

FIRST NATIONAL BANK
OF CLARKSDALE, et al,
Defendants.

ORDER

October 20, 1976

This cause having come on to be heard on motion of United States for preliminary injunction, and the court having considered said motion and having found that the United States has established the basic requisites for the issuance of preliminary injunctive relief including likelihood of success on the merits, irreparable injury if an injunction is not issued, greater injury to the United States by the denial of an injunction than the injury to the defendants if an injunction is granted, and injury to the public interest if an injunction is not granted, it is this 20th day of October, 1976, hereby

ORDERED that the defendants named in the plaintiff-intervenor's complaint and each of them, their officers, agents, servants, employees, attorneys and those in active concert or participation with them be re-

strained and enjoined from seizing, attaching, levying upon, selling, garnishing, or otherwise interfering with the possession and use by Mississippi Action for Progress, Inc., (MAP) of grant funds received from the Department of Health, Education and Welfare pursuant to the terms of Title V of the Economic Opportunity and Community Partnership Act of 1974, 42 U.S.C. §2921 *et seq.*, or otherwise interfering with the operation of the federally assisted program administered by MAP by enforcing or attempting to enforce or allowing any clerk of a court or sheriff to enforce or attempt to enforce the final judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, in the case of *Claiborne Hardware Co., Inc., et al, v. NAACP, et al,* NO. 78-353, as against the funds, property or other tangible assets of MAP pending further orders of this court.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

ORDER FOR SERVICE

The clerk is directed to serve, by United States Mail, Return Receipt Requested, a certified copy of the above and foregoing order upon all counsel of record, which service shall constitute notice to all parties of the issuance of the order.

This 20th day of October, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

No. 71-605

Aaron Henry, et al.,
Petitioners,

versus

Claiborne Hardware Company, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit, it is ordered by this Court that the said petition be, and the same is hereby, denied.

March 27, 1972

Mr. Justice Douglas is of the opinion that certiorari should be granted.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 71-605

Aaron Henry, et al.,
Petitioners,

versus

Claiborne Hardware Company, et al.

A PETITION for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is ordered by this Court that the said petition be, and the same is hereby, denied.

May 30, 1972

Mr. Justice Douglas and Mr. Justice Marshall took no part in the consideration or decision of this petition.

Aaron HENRY et al.,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK
OF CLARKSDALE, et al.,
Defendants-Appellants.

No. 30295.

United States Court of Appeals,
Fifth Circuit.

June 23, 1971.

Rehearing and Rehearing En Banc
Denied Sept. 16, 1971.

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

In this interlocutory appeal, filed pursuant to 28 U.S.C.A. §1292(a),[1] the defendants-appellants, who

1 28 U.S.C.A. §1292(a) provides in pertinent part that:
The courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the

are also complainants in a pending state civil action instituted by them in Mississippi Chancery Court, contest the propriety and validity of an order of the United States District Court of the Northern District of Mississippi entered on June 9, 1970, 50 F.R.D. 251, in which that court preliminarily enjoined the appellants (hereinafter referred to as "state court complainants") from further prosecuting the aforementioned state civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. A clear picture of what has transpired so far in the court below, and of what is and *is not* raised in this interlocutory appeal, is essential to an understanding of our disposition of this case.

I. Facts and Procedural History

A. Background

This controversy began in 1966 when a group of Negro citizens in Port Gibson, Mississippi, began a movement designed to protest what they considered to be racial discrimination practiced by the white merchants and local officials of Port Gibson. The group sought to achieve fair employment practices, fair treatment of Negro customers, and to otherwise eliminate discrimination through the use of economic pressure in the nature of a boycott of the merchants in Port Gibson. The boycott was effectuated by picketing to pub-

United States, * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court * * * .

licize the action, and by other non-picketing activities such as leafleting and public meetings through which citizens of Port Gibson were encouraged to join the boycott. After this boycott had been in effect for several years, twenty-three white merchants of Port Gibson, who were subject to the boycott, joined in a suit filed on or about November 4, 1969, in State Chancery Court in Hinds County, Mississippi, against (1) the National Association for the Advancement of Colored People, a nonresident (New York) corporation; (2) the Mississippi Action for Progress, Inc. (MAP), a federally-funded nonprofit resident corporation, and (3) approximately 150 named individuals, adult residents of Mississippi alleged to be working "in concert with and under the direction of * * * NAACP and MAP." (These three groups of defendants will be referred to hereinafter as the "state court defendants".) In addition, the state court complainants joined as defendants approximately fifty banks in the State of Mississippi alleged to have in their possession funds, property and effects of the nonresident defendant NAACP. The state court complainants alleged that the state court defendants had entered into a conspiracy in restraint of trade and had engaged in secondary boycotts and other malicious and wrongful interference with the state court complainants' businesses, all in violation of the Mississippi Anti-Trust Laws. Miss.Code Ann. 1088, 1089 (1942).[2] Among the allegations of the state court

2 §1088. *Trust and combine — defined.*
A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any

one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who is now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any persons, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney-general, from further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

* * * * *

1089. *Additional contracts or combinations not allowed by law.*

Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimical to public welfare, and shall thus:

complaint are charges that the state court defendants abused the customers of the state court complainants by threatening them with physical violence, addressing them with obscene and insulting language, destroying their property, and beating and assaulting them. For relief, the state court complainants sought (A) to have "the funds, property and effects of the nonresident defendant NAACP, its branches or auxiliary offices in the State of Mississippi, in the hands of and under the control of the resident (defendant Banks) * * * attached" [presumably as a source of damages] and held to await the decrees and orders of the court; (b) to

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

(c) Or shall engross or forestall or attempt to engross or forestall any commodity;

(d) Or shall destroy or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another, differences of freight and other necessary expenses of operating business considered.

have all the defendants (except the Banks) enjoined from "(1) Picketing in or about the business premises of the complainants, (2) stationing guards at or near the vicinity of the said premises of the complainants; (3) soliciting, advising, threatening, coercing and constraining any person from trading with complainants; (4) interfering with the businesses of the complainants; (5) boycotting the businesses of the complainants; (6) asking or demanding that others cease doing business with the complainants; and (7) committing acts in restraint of trade and/or in violation of the laws of the State of Mississippi thereto appertaining;" and (C) to recover damages in excess of 3.5 million dollars, for which the state court defendants would be held jointly and severally liable.

Shortly after filing of this State Chancery suit, and without notice or hearing the Clerk of the Chancery Court for the First Judicial District Court of Hinds County commenced to serve writs of attachment against what was purported to be the funds of the NAACP on deposit in various Banks around Mississippi, ordering the Banks to hold the funds of the NAACP until further notice. The Clerk's action was taken pursuant to Miss.Code Ann. §2730 (1942),[3] which author-

3 §2730. *Attachment against non-residents — how effects or indebtedness bound.*

When a bill shall be filed for an attachment of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or absconding debtor, it shall be sufficient to bind such effect or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service.

izes attachment of the property of non-residents without notice or hearing. It turned out, however, that the Banks upon which the writs of attachment were served had frozen not the assets of the non-resident NAACP, which was a named defendant in the state civil action, but rather the assets of the Mississippi State Conference of the NAACP, and of all local NAACP branches in the State of Mississippi, all of which organizations claim *not* to have been named as defendants in the state civil action, and claim further to be residents of the State of Mississippi and therefore not subject to its non-resident attachment statutes.

B. Proceedings Below: Stage I

Believing that their constitutional rights to due process of law had been infringed by these attachments, the Mississippi State Conference and the Coahoma Branch of the NAACP, acting individually and on behalf of all other local branches similarly situated, filed a section 1983 action in federal court against the Banks which had frozen their funds pursuant to the writs of attachment. The original complaint in this suit was filed on November 7, 1969, by Aaron Henry, President of both the Mississippi State Conference and the Coahoma Branch. (The parties to the original com-

plaint will be referred to hereinafter as the "original plaintiffs.") The original plaintiffs alleged that although they are authorized by the NAACP, a New York Corporation, to use the words "National Association for the Advancement of Colored People" as part of the title of their respective associations, and have agreed to abide by the constitution of the New York NAACP, they are completely autonomous and independent of the New York NAACP. They alleged further that they were not defendants to the state civil action and had received no notice of the suit, and that they are residents of the State of Mississippi and therefore not subject to its non-resident attachment procedures. Charging that they had been and were being irreparably injured in that all their operational funds, which were used to carry out constitutionally protected activities such as a voter registration drive, had been frozen without notice and hearing, and without even being named in the state civil action, they sought "to enjoin (the) attachment of property belonging to them made without compliance with fundamental constitutional guarantees." The original plaintiffs thus moved for a temporary restraining order and a preliminary injunction. The court below held a hearing on the original plaintiffs' motion for a temporary restraining order on November 17, 1969, at which one of the defendant Banks appeared and moved to have the state court complainants made parties to the proceeding on grounds that the state court complainants claimed an interest in the contested funds. The court below granted the Banks' motion, as well as the original plaintiffs'

motion for a temporary restraining order. The court then set December 1, 1969 for a hearing on the original plaintiffs' motion for a preliminary injunction. At this hearing, the state court complainants appeared and contested the motion. At the conclusion of this hearing, and on the strength of the evidence taken, along with the various pleadings of the parties, the court granted the original plaintiffs' motion for preliminary relief on December 15, 1969, ordering the defendant Banks "to release all funds [of the original plaintiffs] held by them pursuant to the writs of attachment * * * upon posting by plaintiffs * * * of a bond in the amount of 110% of [the] funds," and further preliminarily enjoining the state court complainants "from subjecting or causing to be subjected in anyway funds of [the original plaintiffs] deposited in the defendant Banks to attachment or other process causing [the original plaintiffs] to be deprived of the use of their funds."

No appeal was taken by either the Banks or the state court complainants from the interlocutory injunction of December 15, 1969.[4] And although it may be within

4 At the same time the court below issued its preliminary injunction, it issued a separate order overruling the state court complainants' motion to dismiss the action. *See* Memorandum Opinion in No. DC 69-58-S, at 8 (Appendix, Vol. II, at 195). In the order overruling the motion to dismiss, the court below provided that the state court complainants might make application to the Fifth Circuit for an interlocutory appeal from the order, pursuant to 28 U.S.C.A. §1292(b). The state court complainants did make application to this Court for interlocutory appeal from the district court's order denying their motion to dismiss, and leave to appeal was denied on March 4, 1970. Claiborne Hardware Co. et al. v. Aaron Henry et al., Misc.No. 1583 (March 4, 1970). Although the

the scope of our reviewing powers on this appeal to consider the validity of this December 15 interlocutory injunction against the attachments, we decline to do so for several reasons.[5] First, the Banks, against

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state court complainants had a *right* to appeal from the denial of the December 15 preliminary injunction pursuant to 28 U.S.C.A. §1292(a), they chose not to do so, and the time for appealing that order has now lapsed. It is clear that the procedure for taking an appeal from an interlocutory order is precisely the same as that for taking an appeal from a final judgment, and that interlocutory appeals taken pursuant to 28 U.S.C.A. §1292(a) must be timely filed. *See* Dahlen v. Kramer Mach. & Engineering Prod. Co., 10th Cir. 1961, 303 F.2d 293; Stiller v. Squeez-A-Purse Corp., 6th Cir. 1958, 251 F.2d 561. *See also* 9 Moore's Federal Practice ¶ 110.21.

5 Two questions pertaining to the proper scope of our review on this interlocutory appeal present themselves in connection with the December 15, 1969 injunction. First, notwithstanding the failure of both the Banks and the state court complainants to file a timely appeal from the December 15 order, *see* note 4 *supra*, would we have the power to take the matter up in connection with the review of some subsequent appealable order in the case? *See* 9 Moore's Federal Practice ¶ 110.21, at 256 (suggesting an affirmative answer); but *cf.* Stiller v. Squeez-A-Purse Corp., 6th Cir. 1958, 251 F.2d 561 (holding that a party may not circumvent the time requirements for appealing from interlocutory orders by repeatedly moving in the district court to dissolve the interlocutory order, and after repeated orders of denial, appeal from the last order of denial entered in the court, although such an appeal would be untimely if considered as taken from the first order).

Secondly, if consideration of the first order is not foreclosed by time requirements, would it be within the scope of our review of a subsequent interlocutory order to consider a prior order on our own motion? The general rule governing the scope of review on interlocutory appeals is that "the appellate court will not go any further * * * than is necessary to decide the matter upon appeal." 9 Moore's Federal Practice ¶ 110.25 [1], at 269-70. This rule-of-thumb, however, may be only a rule of orderly judicial administration. Once a timely appeal is taken from an order made appealable by statute, some courts have viewed their power to be plenary to the extent they choose to exercise it. *See, e.g.*, Hurwitz v. Directors Guild of America, Inc., 2d Cir., 364 F.2d 67, cert. denied, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966). There is some ques-

whom a major command of the December 15 order runs, are not parties to the present appeal and chose not to appeal the December 15 order when they could have done so.[6] Secondly, the state court complainants, who are the only appellants here, have confined their appeal to questioning the validity of a subsequent interlocutory order of the court entered on June 9, 1970[7] (discussed at length hereinafter). Finally, we de-

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tion, therefore, whether we have the power to consider the December 15 order. Even if our review power on interlocutory appeals is plenary, however, we have decided not to exercise that power in this case for reasons discussed in the text *infra*.

6 *See* note 4 *supra*. Moreover, the state court complainants' failure to appeal the December 15 order appears to have been deliberate, for at the time they had a right to appeal that order pursuant to 28 U.S.C.A. §1292(a), they did appeal a separate, certified order of the district court pursuant to 28 U.S.C.A. §1292(b).

7 In their notice of appeal the state court complainants appeal only from

> "the interlocutory order of the United States District Court Judge for the Northern District of Mississippi, dated June 9, 1970, preliminary restraining and enjoining, until further order of the district court, the defendant and those persons in active concert and participation with them from prosecuting or causing to be prosecuted that certain action now pending in the Chancery Court of the First Judicial District of Hinds County, State of Mississippi, styled Claiborne Hardware Co., et al v. National Association for the Advancement of Colored People, No. 78,353 on the docket of said Court, entered in this action on June 10, 1970."

State Court Complainants' Notice of Appeal, Vol. II, Appendix, at 258-259.

No mention is made of the December 15, 1969, order in the Notice of Appeal, nor have the appellants — state court complainants — briefed whatever questions may be raised by the December 15 order *See, e.g.*, text accompanying notes 19-20, *infra*.

cline to examine the December 15, 1969 order because we think that an examination of that order would be completely unnecessary to a decision of the questions raised by the June 9 order on which this interlocutory appeal is based.[8] To the extent that we have discussed the December 15 order, we have done so for only two reasons: (1) To set the stage for our discussion of the June 9, 1970 order, and (2) to notify the parties that the December 15 interlocutory injunction against the attachments remains standing,[9] pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim that all their funds have been illegally attached without notice and hearing, pursuant to a Mississippi non-resident attachment statute, when these plaintiffs are in fact residents of the State of Mississippi and not even parties to the state civil suit, the filing of which generated the attachments. *Cf., e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27

8 None of the parties have suggested that the December 15, 1969 order interferes in anyway with the pending state civil action. *Cf.* Lynch v. Household Finance Co., D.Conn. 1970, 318 F.Supp. 1111, 1115. And, indeed, we have difficulty seeing how it could interfere if the situation is as the original plaintiffs contended — that is, if the organizations against whom the attachments run are not even parties to the pending state suit. *See also* text accompanying notes 19-20, *infra*.

9 Neither party to this appeal has suggested that the interlocutory injunction of June 9, 1970 (discussed hereinafter) superseded in any way the interlocutory injunction of December 13, 1969, *cf.* Dahlen v. Kramer Mach. and Engineering Prod. Co., 10th Cir. 1961, 303 F.2d 293, nor does our study of the Record indicate that the December 15, 1969 order has been affected in any way by the subsequent orders of the district court.

L.Ed.2d 515 (1971). As we proceed to what really concerns us on this appeal, therefore, we understand that the Banks and the state court complainants are presently preliminarily enjoined from withholding or causing to be withheld, pursuant to writs of attachment issued in connection with Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, Mississippi, funds belonging to the original plaintiffs deposited in the defendant Banks.

C. *Proceedings Below: Stage II*

Several days following the day on which the district court announced its decision to issue a preliminary injunction restraining the withholding of the original plaintiffs' funds,[10] the plaintiffs took steps which greatly enlarged the scope of the issues in the case. Specifically, the NAACP and MAP, both named defendants in the state complainants' pending antitrust suit, were added as parties to the instant suit, and Aaron Henry, who appeared in the original complaint in his official capacity as President of the State Conference and the Coahoma Branch, but not as an individual, appeared in the amended complaint as an individual representing the class consisting of all individuals named in the State Chancery suit. At this time, the plaintiffs also filed an amended complaint which re-

10 The district court actually announced its decision from the bench at the conclusion of the hearing on December 1, 1969. The order was not formally entered until December 15, 1969, the day the original plaintiffs filed their motion to add the state court defendants to the suit.

quested substantially broader relief than originally requested. Generally, the amended complaint sought further relief in the form of (1) an injunction restraining the state court complainants from further prosecuting the pending State Chancery suit, and (2) a declaratory judgment that the anti-trust statutes upon which the state court complainants were relying in the State Chancery suit were unconstitutional on their faces or as applied to the state court defendants.[11]

On December 31, 1969, the original plaintiffs, together with the newly added state court defendants, filed a motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery action. The state court complainants replied with numerous motions of their own, and all outstanding motions were heard by the district court on February 26, 1970. On June 9, 1970, obviously after careful deliberation, and accompanied by a lengthy and thoughtful memorandum opinion which has been very helpful to this Court, the district court entered its order granting, *inter alia*,[12] the motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery suit. It is from this order enjoining their

11 *See* note 2 *supra*.

12 Numerous other motions were granted or denied in the district court's June 9 order. We consider none of them — only that portion of the order granting the motion for a preliminary injunction.

pending antitrust suit in State Chancery court that the state court complainants now appeal. First, they challenge the jurisdiction of the district court. They contend that the district court lacked jurisdiction because (a) there is no section 1343(3) question presented in the complaint since the requisite "state action" to a civil rights action cannot be found in the mere filing of a private civil tort action in state court; and (b) there is no section 1331(a) federal question presented in the complaint since the amended complaint contains no more than what the state court defendants' defense would be to the State Chancery suit and the matter in controversy does not exceed $10,000.[13] Secondly, they urge that 28 U.S.C.A. §2283, the anti-injunction statute, is an absolute bar to enjoining their pending state civil suit. Finally, they argue that "plaintiffs have no absolute right to picket, march and demonstrate." Because we have decided that federal jurisdiction was lacking to support the cause of action alleged in the amended complaint, we do not reach the second and third issues.

II. Jurisdiction

Federal district courts have jurisdiction of actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the federal constitution or any Act of Congress providing for the equal rights of citizens. 28 U.S.C.A. §1343(3) and 12

13 *See* note 15 *infra*.

U.S.C.A. §1983.[14] 1 W. Barron & A. Holtzoff, Federal Practice and Procedure ¶ 37 (Wright ed. 1960). It is, of course, essential to this "civil rights" jurisdiction that the deprivation of rights contested be "state action."[15] The difficult problem has always been to pinpoint the

14 28 U.S.C.A. §1343(3) provides in pertinent part that

> [t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *.

42 U.S.C.A. §1983, which is the statute creating a civil rights cause of action cognizable under 28 U.S.C.A. §1343(3), provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15 It is likewise essential to federal question jurisdiction under 28 U.S.C.A. §1331(a) that there be "state action" when the federal question alleged is one "arising under" the Bill of Rights and the Fourteenth Amendment. *See* Swift v. Fourth Nat'l Bank, M.D.Ga. 1962, 205 F.Supp. 563, at 565. *See also* Hampton v. City of Jacksonville, 5th Cir. 1962, 304 F.2d 320, 322; Smith v. Holiday Inns of America, Inc., 6th Cir. 1964, 336 F.2d 630. In the instant case, the state court defendants predicated jurisdiction not only on section 1983 and 28 U.S.C.A. §1343(3), but also on the Bill of Rights as applied to the States by the Fourteenth Amendment. Since "state action" is required for both, however, to decide the jurisdictional issue under 28 U.S.C.A. §1343(3) is also to decide the jurisdictional issue under 28 U.S.C.A. §1331(a). The two concepts have long been considered identical. United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, at note 7, 16 L.Ed.2d 267 (1966).

boundary between state action and nonstate, or private, action. In this case, we must decide on which side of the boundary lies the mere commencement of a private tort suit in state court.

Relying primarily on New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948),[16] the district court held that "state action" may be found in the filing of a suit between private parties in state court. Both these decisions, therefore, deserve our careful attention. *New York Times* began as a civil suit between private parties in the state courts of Alabama. It resulted in a judgment in the Supreme Court of Alabama against the *Times*. In its opinion on certiorari, the United States Supreme Court devoted only a short paragraph to the problem of judicial involvement in a private lawsuit. It said:

> Although this is a civil lawsuit between private parties, the Alabama courts have ap-

16 The district court also relied on Edwards v. Habib, 1968, 130 U.S.App.D.C. 126, 397 F.2d 687, cert. denied, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969). It is true that Edwards v. Habib contains pages of discussion on the problem of "state action." In those pages, Judge Wright discussed many possible theories of resolving "state action" problems, but he rested his decision on none of them. In fact, he concluded that it was not necessary to decide whether there was "state action" in the case, because the case could be decided merely by construing an Act of Congress. As the only concurring judge pointed out, therefore, the dictum on "state action" was nothing more than "constitutional speculation" and for that reason the concurring judge declined to join in that part of the opinion. *See* 397 F.2d at 703. (Concurring opinion of McGowan, J.)

> plied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute * * * The test is not the form in which state power has been applied but, whatever the form, *whether such power has in fact been exercised.*

376 U.S. at 265, 84 S.Ct. at 718 (emphasis added).

Shelley v. Kramer also began as a private civil suit in state court, where one party was seeking judicial enforcement of a racially restrictive covenant in a deed. The courts of Missouri enforced the covenant, and the United States Supreme Court on certiorari held that state enforcement of a private discriminatory contract violates the fourteenth amendment. The clear message of Shelley v. Kramer is that it is judicial *enforcement* of a private discriminatory contract that brings the otherwise "private action" within the ambit of the fourteenth amendment. What is common to both *Shelley* and *New York Times,* therefore, that is not present in our case, is that "state action" was found in those cases only *after* a final judgment or otherwise dispositive order[17] on the merits had been rendered by the state court. In contrast to these cases in which some dispositive action has been taken by a court, there is a long line

17 *See* Machesky v. Bizzell, 5th Cir. 1969, 414 F.2d 283, 286, where the Court suggests that an injunction granted by a state court may constitute "state action."

of cases which conclude that a state, by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state. *See* Skolnick v. Martin, 7th Cir., 317 F.2d 855, cert. denied, 375 U.S. 908, 84 S.Ct. 199, 11 L.Ed.2d 146 (1963); Skolnick v. Spolar, 7th Cir., 317 F.2d 857, cert. denied, 375 U.S. 904, 84 S.Ct. 195, 11 L.Ed.2d 145 (1963); Moffett v. Commerce Trust Co., 8th Cir., 187 F.2d 242, cert. denied, 342 U.S. 818, 72 S.Ct. 32, 96 L.Ed. 618 (1951); Campo v. Niemeyer, 7th Cir. 1950, 182 F.2d 115; Swift v. Fourth Nat'l Bank, M.D.Ga. 1962, 205 F.Supp. 563; Bottone v. Lindsley, 10th Cir. 1948, 170 F.2d 705, cert. denied, 336 U.S. 944, 69 S.Ct. 810, 93 L.Ed. 1101 (1949). *See also* Jones v. Jones, 7th Cir. 1969, 410 F.2d 365, cert. denied, 396 U.S. 1013, 90 S.Ct. 547, 24 L.Ed.2d 505 (1970); Rhodes v. Meyer, 8th Cir., 334 F.2d 709, cert. denied, 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Sarelas v. Porikos, 7th Cir. 1963, 320 F.2d 827; Wardrop v. Ross, W.D.Pa. 1970, 319 F.Supp. 1299; Drexler v. Walters, D.Minn. 1968, 290 F.Supp. 150, and Pritt v. Johnson, M.D.Pa. 1967, 264 F.Supp. 167 (holding that attorneys who participate in litigation are not acting under color of state law within the civil rights statute). The leading case on this question, which presents a fact pattern very similar to the case at hand, seems to be Stevens v. Frick, 2d Cir., 372 F.2d 378, cert. denied, 387 U.S. 920, 87 S.Ct. 2034, 18 L.Ed.2d 973 (1967). *Stevens* was an action to enjoin the defendant from further prosecuting a pending civil suit for libel in the Pennsylvania courts on grounds that the mere filing and pendency of the suit "chilled" the plaintiffs' first amendment rights. Like the plain-

tiffs herein, the plaintiffs in *Stevens* relied on Shelley v. Kramer to support civil rights jurisdiction in the case. The Second Circuit rejected this argument and, distinguishing *Shelley*, stated the following:

> By contrast (with Shelley v. Kramer), in this case no order or judgment has been entered under which the power of the state is invoked to suppress the Stevens book, nor is there any Pennsylvania statute or case which authorizes the imposition of unconstitutional restraints on freedom of the press. * * * Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that *merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state.* * * *

372 F.2d at 381 (emphasis added). The court concluded therefore that Stevens did not have a claim cognizable under the Civil Rights Act.

The reason for the principles enunciated in the above-cited cases is manifest: Judicial bodies are supposed to be neutral; perhaps their most magnificent feature is their accessibility to all claimants, no matter how unfounded those claimants' contentions may turn out to be. To say that an open courthouse door constitutes "state action" is to assume that the party whose private suit is challenged as "state action" already has

the court on his side before the adjudicatory process even commences. The essence of "state action," as defined in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), is action in which the "[s]tate has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the fourteenth amendment] * * * that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725, 81 S.Ct. at 862. To apply this test to the mere filing of a private civil complaint in a state court and conclude that "state action" results would be to demean the judicial process. It would be to forget that a court is an open forum before which each party is to have a full and fair opportunity to make his case. Only after both parties to a private civil action here had their day in court and the court has reached its decision and rendered its judgment does the full power of the state come into play in enforcing the judgment. We need only look at the status of the pending civil suit in the instant case to demonstrate this principle. As things stood at the time the court below issued its preliminary injunction, there were no indications what, if any, evidence the state court complainants would be able to produce to support their various allegations of violent and abusive conduct, nor were there any indications whether the state court complainants would be able to substantiate their claimed loss of 3.5 million dollars. Thus, from a

factual standpoint, it was entirely uncertain whether the state court complainants would even be able to carry their burden of proof in the case. From the standpoint of the legal questions presented, the state court complainants were proceeding to court armed with state antitrust statutes which, from all apppearances, no Mississippi court has ever applied in a noncommercial situation. The state court defendants, on the other hand, no doubt would have armed themselves with the First Amendment to the United States Constitution and numerous Supreme Court opinions holding that their right to picket peacefully is constitutionally protected. At the time the court below issued its injunction, the Mississippi Chancery Court had made no dispositive determinations, factual or legal, on any of these difficult issues. In other words, the State, through its courts, had taken a stand on neither side of this very difficult controversy.

The effect of the relief the state court defendants seek in this Court, through their argument that the state court complainants' use of the Mississippi courts constitutes "state action," would be to shut the doors of the Mississippi courts to its citizens before those citizens have an opportunity to present their case. For us to take such a step, the situation must be drastic indeed. We are asked to take the step, however, on grounds that the state complainants' suit is unfounded and that its mere pendency chills the state court defendants' first amendment freedoms. *But see* Younger v. Harris, 401 U.S. 37, at 50, 91 S.Ct. 746, at 754, 27 L.Ed.2d 669 (1971). Remedies exist in our system of justice for unfounded suits in the common law actions

for malicious prosecution and abuse of process.[18] And it is through the faithful enforcement of these remedies, rather than through denying access to the courts in the first instance, that, for the most part, the menace of bad faith private litigation should be controlled. The state defendants argue, however, that the "state action" needed to support their amended complaint attacking the state court complainants' antitrust suit can be found in the aforementioned prejudgment attachments of funds belonging to the various original plaintiffs. They rely heavily on the recent Supreme Court decision in Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1971). *Sniadach* involved the constitutionality of a Wisconsin prejudgment garnishment procedure. The debtor's wages in that case were garnished. She moved in state court that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment, and the Supreme Court of Wisconsin sustained the lower court in approving the procedure. The United States Supreme Court reversed, holding that the procedure violated the due process requirements of the Fourteenth Amendment. Although the Court did not address itself to the question whether "state action" was present in the garnishment procedure, implicit in its holding that the procedure violated the Fourteenth Amendment is the conclusion that "state action" was present, since "state ac-

18 Mississippi jurisprudence recognizes a cause of action for abuse of process or malicious prosecution. Allen v. Ritter, 235 So.2d 253 (1970); Wutzke v. Wayne Lee's Grocery and Market, Inc., 199 So.2d 438 (1967); Kitchens v. Barlow, 250 Miss. 121, 164 So.2d 745 (1964).

tion" is required to invoke the protection of the Fourteenth Amendment. *See* Hall v. Garson, 5th Cir. 1970, 430 F.2d 430, 439-440. Of course, as we have made clear at the outset of this opinion, neither the validity of the attachments below nor the validity of the December 15 preliminary injunction against them is presented to us on this appeal. It is not necessary, therefore, for us to say whether, *taken alone,* involved "state action" for federal jurisdictional purposes. But even assuming for the moment that "state action" was involved in the attachments, we do not think it can be fairly said that such "state action" extends to the entire underlying private antitrust suit.

The very nature of the garnishments attacked in *Sniadach,* and of the attachments attacked below, makes it clear that these ministerial acts should be treated as separate matters from the suits underlying them. This much is indicated in the following language from *Sniadach,* describing the procedure under attack in that case:

> What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby wages are frozen. *They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity*

> *to be heard* and to tender any defense he may have, whether it be fraud or otherwise.

395 U.S. at 338-339, 89 S.Ct. at 1821 (emphasis added). The administrative acts complained of in *Sniadach,* and, it may be argued, in the attachments below, had an indisputable aspect of finality wherein the full authority of the State was brought to bear on the complaining party.[19] But obviously this does not mean that there was any finality or any "state action" about the still pending "main suit" (as it was referred to in *Sniadach*), or "underlying suit" (as we shall call the state court complainants' antitrust suit here). Thus, to say that the "state action" contained in a summary garnishment, such as that in *Sniadach,* or that may be contained in a prejudgment attachment, such as that below, clothes the entire underlying suit in the garb of "state action" when no evidence has been presented in the underlying suit and no decision on the merits reached, is to sweep too broadly. Most of the time, the prejudgment procedure bears no meaningful relation to the underlying suit; it is true that the institution of the underlying suit triggers the prejudgment procedure, but that is

19 As a general rule, of course, the ministerial acts of a court's officers, who in the performance of their official responsibilities issue process and levy execution, are not considered to be an action under color of state law. Dinwiddie v. Brown, 5th Cir., 230 F.2d 465, cert. denied, 351 U.S. 971, 76 S.Ct. 1041, 100 L.Ed. 1490 (1956); Schatte v. International Alliance, 9th Cir., 182 F.2d 158, cert. denied, 310 U.S. 827, 71 S.Ct. 64, 95 L.Ed. 608 (1950). *See also* Hanna v. Home Insurance Co., 5th Cir. 1960, 281 F.2d 298, cert. denied, 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747 (1961). The distinction between these cases and the *Sniadach*-type case can be found, we think, in the *effect* of the particular administrative act in question.

as far as the relationship goes. Thereafter, the prejudgment procedure takes place regardless of the merits or substantive content of the underlying suit. In reality the prejudgment procedure is usually a separate matter, and clearly courts should be capable of treating it separately. Certainly, in the instant case, the prejudgment attachments should be viewed separately from the underlying suit predicated on the Mississippi antitrust laws. Under the Mississippi non-resident attachment statute, the writs would have issued regardless of what the underlying suit involved. As the state court defendants pointed out in their brief in this Court, under the Mississippi non-resident attachment procedure, the complaining party has complete control over whether a prejudgment attachment is made; all the statute requires is that the complaining party state the nature and object of his suit on the summons, and the Clerk will then serve the writs regardless of the merits of the complaining party's underlying suit. Moreover, in the instant proceedings the parties themselves consistently have treated the attachments as a separate matter from the suit. And justifiably so, for, as we pointed out earlier, the attachments ran against persons who allegedly *were not even parties* to the state "antitrust" suit. It must be remembered that the original plaintiffs below sought and obtained injunctive relief first against *only* the attachments on the strength, in part, of their contentions that they *were* residents and were *not* parties to the pending state suit. And the issuance of the injunction against the attachments apparently interfered in no way with the prosecution of the pending civil suit, for the state court defendants there-

after found it necessary to enter the instant proceeding and seek the much broader relief of an injunction against the pending state suit itself. *Cf.* Lynch v. Household Finance Corp., D.Conn. 1970, 318 F.Supp. 1111, 1115. Finally, on this appeal the state court complainants have not appealed from the order enjoining the attachments, while they have appealed from the order enjoining the pending, underlying suit. What we are saying, therefore, is that the "state action" which may be found in ministerial acts performed in connection with a prejudgment attachment does not necessarily extend to the otherwise wholly private action of *a still undecided* underlying pending civil suit;[20] on the facts of this case, it most certainly does not.

Since we conclude that there is no "state action" to be found in the mere filing of a private civil tort action in state court, the district court's order of June 9, 1970, enjoining the prosecution of the pending state civil action should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

Vacated and remanded with directions.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

PER CURIAM:

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20 *See* notes 4-9, *supra*, and accompanying text.

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

AARON HENRY, et al,
Plaintiffs,

versus No. DC 6958-S

FIRST NATIONAL BANK
OF CLARKSDALE, et al,
Defendants.

PRELIMINARY INJUNCTION

On motion made by plaintiffs for a preliminary injunction, and a hearing having been held on said motion on December 1, 1969, and all parties having appeared by counsel and the Court having heard the arguments of counsel and having considered the evidence herein, it is hereby

ORDERED, pending final disposition of this case, that

1. This is a proper class action on the part of the plaintiffs,

2. The class represented by defendant First National Bank of Clarksdale is a proper defendant class. The members of said class are the banks named in Plaintiff's Exhibit 2, submitted at the hearing, a copy of which is annexed hereto and made a part hereof, and any other bank which plaintiffs in the future show is withholding funds of a member or members of the plaintiffs class pursuant to writs of attachment issued in Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County,

3. The defendant banks whose names appear on Plaintiff's Exhibit 2 shall release all funds of plaintiffs held by them pursuant to writs of attachment issued in Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County upon posting by plaintiffs with the Clerk of this Court of a bond in the amount of 110% of said funds,

4. The bond required under par. 3 above shall be a good and sufficient bond, shall be approved by the Clerk, and shall be conditioned upon the plaintiffs and their sureties making the defendant banks whole from any loss sustained by the said banks as a result of their

complying with the order of this Court and releasing the funds of plaintiffs. Plaintiffs shall further be required to post separate bonds, as follows:

(a) a bond in the amount of $7,150.00 to secure the release of funds held in First National Bank of Clarksdale;

(b) a bond in the amount of $8,789.00 to secure the release of funds held in Deposit Guaranty National Bank;

(c) a bond in the amount of $4,433.83 to secure the release of funds held in the remaining banks named in Plaintiff's Exhibit 2.

Subsequent to the posting and approval of such bonds, plaintiffs and their class shall have the right to freely use their respective bank accounts by withdrawing and depositing funds therein.

5. Defendants herein, who are Complainants in Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, are preliminarily enjoined, subject to final action of this Court, from subjecting or causing to be subjected in any way funds of plaintiffs deposited in the defendant banks to attachment or other process causing plaintiffs to be deprived of the use of their funds.

6. A certified copy of this order, when accompanied by a certificate of the Clerk that the required

bond has been posted, shall constitute the order of this Court to the defendant banks to release the funds of plaintiffs.

7. That the Clerk of the Court shall mail a certified copy of this order to each attorney who has appeared as counsel of record in this cause.

This 15th day of December, 1969.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT JUDGE

PLAINTIFF'S EXHIBIT 2

1. FIRST NATIONAL BANK OF CLARKSDALE
"Coahoma County Branch NAACP" $6,500.00 as of 11/22/69
2. FIRST NATIONAL BANK OF JACKSON
"NAACP" $249.86 as of 11/4/69
   a. COMMERCIAL NATIONAL BANK OF GREENVILLE (Branch)
   Nothing
   b. BANK OF GREENWOOD (Branch)
   Nothing
3. FIRST NATIONAL BANK OF GREENVILLE
$182.24 (checking account) as of 11/5/69
"NAACP of Washington County."
4. BANK OF PRENTISS
"Prentiss NAACP" (checking) $319.60 as of 11/7/69

5. BANK OF CLEVELAND
"NAACP, by . . . ." $74.63 as of 11/10/69

6. FIRST NATIONAL BANK OF VICKSBURG
Vicksburg Branch, NAACP Youth Council, $26.70
Vicksburg Branch, NAACP, $114.49 as of 11/6/69

7. BANK OF WESTPOINT
"Clay County Branch NAACP" $451.50 as of 11/12/69

8. PEOPLES BANK OF INDIANOLA
"NAACP" $179.16 (regular checking)
4.06 (registration fund checking)
as of 11/12/69

9. JEFFERSON COUNTY BANK—Fayette
"Jefferson County Branch NAACP," $1,031.03 as of 10/31/69 (checking)

10. MERCHANTS & FARMERS BANK—Meridian
NAACP $98.04 as of 11/17/69

11. CITIZENS NATIONAL BANK—Belzoni
Mississippi Action for Progress, Inc.
$148.76 as of 11/19/69

12. FIRST CITIZENS NATIONAL BANK—Tupelo
"NAACP, Lee County Branch" $21.00 as of 11/13/69

13. THE COMMERCIAL BANK—Woodville
NAACP ($171.48) (checking) as of 11/21/69

14. PORT GIBSON BANK
"Medgar Evers—NAACP", $247.59 as of 11/21/69

15. COMMERCIAL NATIONAL BANK & T. CO. OF LAUREL
"Laurel Branch NAACP," $16.46 (checking) as of 11/21/69

16. SOUTHERN NATIONAL BANK OF HATTIESBURG
"Mississippi State Youth Conference, NAACP," $.33 as of 11/20/69

17. CITIZENS BANK OF HATTIESBURG
"NAACP" $693.82 as of 11/19/69

18. DEPOSIT GUARANTY NATIONAL BANK
Mississippi State Conference NAACP, $7,990.00.

Aaron HENRY et al.,
Plaintiffs,

versus

FIRST NATIONAL BANK
OF CLARKSDALE, et al.,
Defendants.

No. DC 69-58-S.

United States District Court,
N.D. Mississippi,
Delta Division.

June 9, 1970.

MEMORANDUM OPINION

ORMA R. SMITH, District Judge.

This action has been submitted to the Court on numerous motions filed herein by the parties. In order to understand the issues presented by the motions it is proper that a chronological resume be made of the procedural steps which have been taken herein.

The many issues before the Court have grown out of the filing of a suit in the Chancery Court, First Judicial District, Hinds County, Mississippi.[1] On or about November 4, 1969, Claiborne Hardware Company, Inc., and others, most of whom are resident citizens of the City of Port Gibson, Claiborne County, Mississippi, filed a Bill of Complaint in the State Court to enjoin the National Association For The Advancement Of Colored People (NAACP), a foreign corporation organized and existing by virtue of the laws of the State of New York, but authorized to do and doing business in the State of Mississippi, the Mississippi Action For Progress, (MAP), a nonprofit Mississippi Corporation, and numerous individuals from picketing or causing to be picketed and from encouraging or causing to be encouraged a boycott of the businesses of complainants in the City of Port Gibson. The complainants also sought damages from the defendants in the aggregate sum of $3,542,466.04.

The complainants in the State Action prayed for and obtained a non-resident attachment in Chancery against NAACP, *its branches or auxiliary offices* in the State of Mississippi. This relief was sought under Sections 2729 et seq., Mississippi Code, 1942, Annotated, Recompiled (1957), which provide generally for the attachment in Chancery of the effects of a non-resi-

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1 This State suit will be referred to in this opinion as the "State Action".

dent, absent or absconding debtor in the hands of persons in this state.[2]

One of the defendants in the case sub judice, First National Bank of Clarksdale, (FNBC) and fifty-five

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2 Sections 2729 and 2730, Mississippi Code, 1942. Annotated, Recompiled (1957), provide:

"§2729. Non-residents — absent or absconding debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

§2730. Attachment against non-residents — how effects or indebtedness bound.

When a bill shall be filed for an attachment of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service."

other banks in the State of Mississippi were made parties defendant in the State Action, and were said to have funds or effects of NAACP, its branches or auxiliary offices, in their hands which were subject to non-resident attachment in the action. Process was issued and duly served in the state on all defendants including FNBC and the other defendant banks named in the complaint.

The Mississippi State Conference of the National Association For The Advancement Of Colored People (State Conference), an unincorporated association, resident of Mississippi, and the Coahoma County Branch Of The National Association For The Advancement Of Colored People (Coahoma Branch), an unincorporated association, resident of Mississippi and a member of the State Conference, filed a verified complaint in the case sub judice on November 7, 1969. The Bank of Clarksdale, Coahoma National Bank, and FNBC, are named as defendants in the action, and are sued as a class, the members of which are alleged to be all other banks, who were named as defendants in the State Action.

The complaint alleged that the State Conference is an unincorporated association, a resident of Mississippi and the owner of the property situated within the state; that the Coahoma Branch is an unincorporated association, a resident of Mississippi, and the owner of property situated within the state, and that each member of the class is an unincorporated association, a resident of Mississippi and the owner of property situated within the state.

The State Conference and the Coahoma Branch filed the action through Aaron Henry, a resident of Coahoma County, Mississippi, who is president of both the State Conference and the Coahoma Branch. The Coahoma Branch brought the action in the case sub judice for all other local NAACP Branches within the State of Mississippi.

The plaintiffs allege that although they and each member of the class represented by the Coahoma Branch are authorized by NAACP to use the words "National Association For The Advancement Of Colored People" as a part of the title of their respective associations, and have agreed to abide by the constitution of NAACP, they are completely autonomous and independent of NAACP, and that the branches are autonomous and independent of the State Conference.

The plaintiffs also allege in the complaint that they and the members of the class represented by the Coahoma Branch are not defendants to the State Action.

The plaintiffs allege in the complaint that as a result of the State Action the funds of plaintiffs and members of the class represented by plaintiff Coahoma Branch, have been sequestered in the hands of the banks named as defendants in the State Action and thus, such funds are not available for their use in the promotion of the activities in which they are engaged, i.e. activities protected by the First Amendment to the Constitution of the United States designed to secure the equal rights of the Negro citizens of the State of Mississippi and the United States.

The plaintiffs allege, inter alia, that the funds aforesaid have been sequestered in an action to which they and the members of the class represented by the Coahoma Branch are not parties, without notice of any kind or an opportunity to be heard; that the attachment has and will in the future cause extraordinary and irreparable injuries to them and the said class; that plaintiffs and the members of said class are seriously hampered in their day to day activities; that prospective members of or contributors to the branches aforesaid have been frightened and deterred from joining or contributing money to the branches; that persons who would otherwise associate to engage in activities protected by the constitution have been frightened and deterred from engaging in such activities from fear that their property might be attached because of some presumed connection with a non-resident organization; and that the State Action was filed by the complainants therein with such a callous indifference to the rights of others as to amount to malice and bad faith.

Plaintiffs bring the action sub judice pursuant to 42 U.S.C.A. §1983, the Civil Rights Statute of April 20, 1871, and invoke the jurisdiction of the court under 28 U.S.C.A. §§ 1331 and 1343.

Plaintiffs moved for a temporary restraining order requiring defendant banks to release the funds aforesaid. The Bank of Clarksdale and the Coahoma National Bank answered the action and affirmatively stated that they did not have possession of or control over any

funds subject to the attachment process of the State Action. These defendants were dismissed from the action. The FNBC answered, and acknowledged that it had in its possession and under its control certain funds belonging to the Coahoma Branch.

A hearing was held by the Court on plaintiffs' motion for a temporary restraining order at Aberdeen on November 17, 1969. FNBC appeared at the hearing and in the course of the trial, moved ore tenus that the complainants in the State Action be made parties defendant to the action, sub judice, on the ground that such parties claimed an interest in the funds in its possession belonging to the Coahoma Branch, and were, therefore, necessary and proper parties to the pending action.

The Court being of the opinion that the action could not proceed to final judgment without the appearance of the complainants in the State Action, directed that such parties be made parties defendant to the action. Pursuant to the Court's order, plaintiffs caused a summons, together with copies of the complaint, motion for preliminary injunction and temporary restraining order issued by the Court, to be served on each of such State Action, complainants as hereinbefore indicated. The Court entered a temporary restraining order requiring FNBC to release all funds in its possession belonging to plaintiff Coahoma Branch, from the attachment issued in the State Action upon the posting by the plaintiffs of a bond in the aggregate amount of the funds attached, plus the sum of $1,000.00. The order

provided for steps to be taken by which funds in the hands of other banks, members of the class represented by FNBC, might be released from the attachment process.

The Court set a hearing on the motion for a preliminary injunction at Oxford, Mississippi on December 1, 1969. A hearing was held at the appointed time. The complainants in the State Action appeared in response to the summons issued and duly served upon them, and filed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted and that the Court lacked jurisdiction of the subject matter.

At the conclusion of the hearing the Court announced from the bench his decision to grant the motion for a preliminary injunction and deny the motion to dismiss. The Court requested counsel to prepare an appropriate order. Counsel could not agree on an appropriate order. The Court received proposed orders from counsel for plaintiffs and counsel for defendants, complainants in the State Action. The proposed orders were made a part of the record in the case. The Court entered its own order December 15, 1969, but it was not lodged with the Clerk until December 16, 1969. In the order overruling the motion to dismiss, which was separate from the one ordering the issuance of a preliminary injunction, the Court provided that the said defendants might make application to the Fifth Circuit Court of Appeals for an interlocutory

appeal from the order, pursuant to 28 U.S.C. §1292(b). The said defendants made application to the Court of Appeals for the Fifth Circuit for an interlocutory appeal, which was denied on March 4, 1970.[3]

On the day before the Court's orders carrying into effect the decision of the Court, announced at the hearing on December 1, 1969, were lodged with the Clerk, that is on December 15, 1969, NAACP filed herein a motion to intervene as a party plaintiff. Plaintiffs also filed a motion on that day to make MAP a party defendant.

NAACP, State Conference, Coahoma Branch, individually and on behalf of all others similarly situated, and Aaron Henry, individually and on behalf of all others similarly situated, filed an amended complaint which greatly enlarged the scope of the issues in the case. Aaron Henry appeared in the original complaint in his official capacity of President of State Conference and Coahoma Branch, but not as an individual. In the amended complaint he appeared as an individual and as representative of a class consisting of all individuals named as defendants in the State Action.

The amended complaint makes MAP a party defendant and in essence makes a direct attack on the State Action. In the first cause of action in the amended complaint plaintiffs seek a declaratory judgment that plaintiffs and members of the class represented by plaintiffs

3 Claiborne Hardware Co. et al. v. Aaron Henry et al., Misc. No. 1583.

have First and Fourteenth Amendment rights to peacefully picket, march, demonstrate, distribute leaflets or otherwise publicize and protest their grievances of racial discrimination and denial of equal rights by either the business community or officials of Port Gibson or Claiborne County, to conduct an economic boycott of merchants they believe are acting in a racially discriminatory manner, and to urge others to comply with such boycott. In the first cause of action plaintiffs also seek an injunction restraining defendants, complainants in the State Action, from prosecuting the suit.

The second cause of action in the amended complaint seeks a declaratory judgment that Sections 2729-2734, Mississippi Code, 1942, Annotated, Recompiled (1957) are unconstitutional on their face and as applied in the State Action deprive persons subject to attachment thereunder of the due process and equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The second cause of action also seeks an injunction against the defendant banks in the case sub judice from detaining in any way the funds of plaintiffs.

The third cause of action in the amended complaint seeks a declaratory judgment that State Conference, Coahoma Branch and the branches represented by Coahoma Branch as a class are residents of the State of Mississippi and are not subject to the provisions of Sections 2729-2734 of the Mississippi Code of 1942, Annotated, Recompiled (1957). Injunctive relief as prayed for under the second cause of action is also sought under the third cause of action.

In the fourth cause of action in the amended complaint plaintiffs seek to have the Court declare unconstitutional Section 2059.3, Mississippi Code of 1942 (1958 Supp.), (Conspiracy-unlawful restraint of trade-civil liability) and restrain defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or other suits against plaintiffs in which recovery is dependent on the validity of Section 2059.3.

The fifth cause of action in the amended complaint seeks a declaratory judgment that Sections 1088 and 1089 of the Mississippi Code of 1942, Annotated, Recompiled (1957) which prohibit certain trusts, combines, or other agreements in restraint of trade when inimical to public welfare, cannot constitutionally be applied to restrain First Amendment activities, such as described in the amended complaint. Injunctive relief is sought restraining defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or any other suit against plaintiffs in which it is sought to restrict First Amendment rights on the basis of said Sections 1088 and 1089.

The sixth cause of action set forth in the amended complaint seeks a declaratory judgment that plaintiffs are entitled to a jury trial in the event the State Action proceeds to trial, and an injunction restraining defendants, complainants in the State Action, from bringing the State Action on for trial on the issue of money damages unless plaintiffs are accorded the right to trial by jury.

The amended complaint does not seek a Three-Judge Court to hear the constitutional issues presented in the second and fourth causes of action, since plaintiffs do not seek to restrain the action of any officer of the state, and, as to the constitutional questions presented by the Fifth and Sixth causes of action, plaintiffs do not seek a Three-Judge Court, since they do not seek injunctive relief against any officer of the state, neither do they seek a declaration that the statutes involved in said causes are unconstitutional on their face, but rather the application of the statutes and procedures to this particular case only.

The amended complaint was filed without plaintiffs having first obtained an order from the Court permitting such to be done. The motion to intervene filed by NAACP, sought leave for NAACP to intervene as a plaintiff in the action, in order to assert the claims set forth in the amended complaint submitted with the motion. The motion was bottomed on the ground that the case sub judice seeks, inter alia, an injunction against the State Court proceedings, in which NAACP is a party defendant and in which it has an interest. NAACP also asserted that its claims involve questions of law and facts common to those raised by all the plaintiffs in the action.

The plaintiffs filed, on December 31, 1969, a motion for a preliminary injunction restraining defendants, complainants in the State Action, from further prosecuting said action or causing the same to be prose-

cuted. Plaintiffs assert as grounds for the motion that such an injunction is necessary to prevent irreparable injury to plaintiffs pending the ultimate determination of the case sub judice; to preserve the status quo of the parties until final determination of the action; to permit the Court to grant full and effective relief in the event plaintiffs ultimately prevail; and to prevent expense and waste in the event that plaintiffs are ultimately successful in the action.

On January 6, 1970, defendants, complainants in the State Action, filed a motion for change of venue to the United States District Court for the Southern District of Mississippi, asserting that such a change is warranted for the convenience of the parties and in the interest of justice.

On January 16, 1970, defendants, complainants in the State Action, noticed the depositions at Clarksdale, Mississippi, January 26-January 30, 1970 of ten individuals, members of the class represented by plaintiff Aaron Henry.

On January 22, 1970 plaintiffs noticed the depositions of six of the defendants, complainants in the State Action, at Clarksdale, Mississippi on February 2, 1970.

On January 28, 1970 defendants, complainants in the State Action, filed a motion to strike the amended complaint and dismiss the action. The basis of the motion is the alleged refusal of the ten individuals noticed for depositions, as aforesaid, to appear for the deposition.

There is attached to the motion copy of letter written by plaintiffs' counsel in which the position was taken that the named individuals, though members of the class represented by plaintiff Henry in the suit, were not themselves parties for the purpose of discovery under the Federal Rules, but rather witnesses, who must be dealt with as such. Counsel insisted that to secure the attendance of the individuals at the deposition, they were entitled to the service of subpoenas and payment of fees and mileage, pursuant to the provisions of Rule 45, Federal Rules of Civil Procedure.

There is attached to the motion a copy of a stipulation filed in the case in which it is agreed that notice of the taking of the depositions was duly served on counsel for plaintiffs; that defendants had not personally served the said individuals with subpoenas or other notice of the taking of the depositions, nor had they tendered witness fees or mileage to said individuals; that should the individuals appear for the depositions defendants would not serve subpoenas upon them, nor tender witness fees or mileage; and that plaintiffs' attorneys would not cause the persons named in the notice of the depositions to appear at the time and place indicated.

On January 28, 1970 defendants filed a motion to stay taking of depositions of defendants by plaintiffs until defendants completed depositions on oral examination of plaintiffs and witnesses. The Court entered an order on this motion on February 5, 1970, staying the taking of depositions by all parties until further orders of the Court.

All outstanding motions were heard by the Court at Oxford, Mississippi on February 26, 1970, at which time the Court took all motions under advisement and requested additional briefs.

The Court has now received and considered elaborate, excellent, exhaustive and extensive briefs from the parties in support of all motions, and has carefully studied and reviewed the entire record in the case.

THE AMENDED COMPLAINT

THE MOTION TO INTERVENE

THE MOTION TO ADD PARTY DEFENDANT

At the threshold the Court must determine whether to recognize the amended complaint filed by original plaintiffs, NAACP, and Aaron Henry, individually, and as the representative of a class composed of all individual defendants in the state action. On the issue rests the determination of many questions here involved.

Defendants[4] question the appropriateness of the Court's action ordering them to be made parties defendant herein on the ore tenus motion of FNBC at the initial hearing in this case.

As hereinbefore mentioned, the Court's action was prompted by the assertion by FNBC that the Court could not finally determine the issues involved and render complete relief between those already made parties without the presence of defendants. Defendants claim an interest in the deposits of Coahoma Branch with FNBC to the extent that the money represented thereby may be subjected to the demand of defendants in the state action. FNBC is a mere stakeholder and has no interest in the outcome of the litigation. It is apparent that the Court would be powerless to finally dispose of the case without the presence of defendants, who, by virtue of their claims against the funds mentioned, are indispensable parties. The Court is of the opinion that the Court's action in this regard was proper.

4 The defendants, complainants in the State Action, will be referred to in the remainder of this opinion as "defendants".

Defendants allege in the State Action that the original plaintiffs herein are branches of NAACP, the nonresident defendant. Thus, one of the issues involved in the case sub judice, is the relationship of the original plaintiffs to NAACP.

Another issue tendered by the original complaint is the contention of the original plaintiffs that the State Action infringes upon their First Amendment Rights.

The amended complaint was filed after defendants appeared in the action pursuant to process served upon them, but before they answered the complaint. At the time the amended complaint was filed FNBC had answered, but gave its consent to the filing of the amended complaint.

Under these circumstances the original plaintiffs were entitled to file the amended complaint as a matter of right without an order of the Court, with the exception that the original plaintiffs could not effectively add parties to the action without the Court's permission.[5]

The original plaintiffs named NAACP as a party plaintiff and MAP as a party defendant in the amended complaint in order to avoid further amendment should the Court sustain their motion to add MAP as a party defendant and NAACP's motion to intervene.

NAACP seeks to intervene pursuant to the provisions of Rule 24(a)(2) of Federal Rules of Civil Procedure, which provide for intervention of right "when the applicant claims an interest relating to the proper-

5 Rule 15(a) Federal Rules of Civil Procedure provides "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * * ."

It is held in Moore's Federal Practice, Second Edition, Vol. 3, page 851, §15.07(2):

"The term 'a responsive pleading' as used in Rule 15(a) should be interpreted by reference to Rule 7(a), which defines 'pleadings' as including only the complaint, the answer, the reply, the answer to a cross-claim, and the third-party complaint and answer. So it has been held that a motion to dismiss for failure to state a claim is not a 'responsive pleading' within the meaning of Rule 15, and pleadings may be amended after such motions are made."

As to adding parties, Moore's holds at page 858, in Vol. 3, as follows:

"Rule 21 governs the procedure for dropping or adding parties, and requires an order of the court. Consequently a party may not be added by amendment of the complaint as of course."

See also International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. AFL-CIO, (E.D.Mich. 1963) 32 F.R.D. 441, which holds that an amendment to complaint to add or drop a party requires an order of the court under Rule 21, which controls and limits Rule 15(a).

ty or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties", and Rule 24(b)(2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common".

The motion of NAACP to intervene is bottomed on the contention that it is a defendant in the State Action, against which an injunction is sought in the action sub judice, and therefore has an interest relating to the subject matter of the action, and that its claims involve questions of law and fact common to those raised herein by the original plaintiffs.

It is clear to the Court that NAACP cannot intervene herein as a matter of right. While NAACP claims an interest relating to the transaction which is the subject of the action sub judice, it does not claim that its interest is not adequately represented by the existing parties. Both of these elements are necessary when the intervention is sought as a matter of right.[6] Rule 24(a)(2) F.R.Civ.P.

6 In Atlantis Development Corporation v. United States, 5 Cir. 1967, 379 F.2d 818, at page 825, the court said:

"Of course F.R.Civ.P. 24(a)(2) requires both the existence of an interest which may be impaired as a practical matter and an absence of adequate representation of the intervenor's interest by existing parties. There can be no difficulty here about the lack of representation."

Since NAACP does not claim that the original parties will not adequately represent its interest in the case, intervention cannot be allowed as a matter of right.

If NAACP is permitted to intervene, such must be done under the provisions of Rule 24(b)(2) of F.R.Civ.P.

It is at once apparent that NAACP's claims and the main action herein have questions of law and fact in common.

The general purpose of the Rules of Federal Procedure is that they "shall be construed to secure the just, speedy, and inexpensive determination of every action." F.R.Civ.P. Rule 1.

The Court is of the opinion that the disposition of the case sub judice may as a practical matter impair or impede the ability of NAACP to protect the interest which it claims in the subject matter of the action. In a very real and practical sense the trial of this action is the trial of NAACP's suit as well.

While the decision in the case sub judice will not constitute res judicata or be binding as a matter of law on NAACP, if its motion to intervene is denied, for all practical purposes, the decision will, as a matter of stare decisis, control the trial of the issues in a subsequent separate action by NAACP.

The Court's decision in this case will more than likely be appealed to Circuit Court of Appeals, and the decision of that Court on the issues involved herein will surely control the disposition of similar or the same issues in a subsequent separate action between NAACP and defendants.

The Fifth Circuit, in discussing its adherence to the stare decisis doctrine said in *Atlantis*, Note 6, supra:

> "It also assumes that in the subsequent separate trial of the claim of Atlantis against the Government the prior decision would be followed as a matter of stare decisis. Do these assumptions have a realistic basis? Anyone familiar with the history of the Fifth Circuit could have but a single answer to that query. This Court, unlike some of our sister Circuit Courts who occasionally follow a different course, has long tried earnestly to follow the practice in which a decision announced by one panel of the Court is followed by all others until such time as it is reversed, either outright or by intervening decisions of the Supreme Court, or by the Court itself en banc. That means that if the defendants in the main action do not prevail upon these basic contentions which are part and parcel of the claim of Atlantis, the only way by which Atlantis can win is to secure a rehearing en banc with a successful overruling of the prior decision or, failing in either one or both of those efforts, a reversal of the earlier decision by the Supreme

Court on certiorari. With the necessarily limited number of en banc hearings in this Circuit and with the small percentage of cases meriting certiorari, it is an understatement to characterize these prospects as formidable."

* * *

We are dealing here with a conjunction of a claim to and interest in the very property and the very transaction which is the subject of the main action. When those coincide, the Court before whom the potential parties in the second suit must come must itself take the intellectually straight forward, realistic view that the first decision will in all likelihood be the second and the third and the last one. Even the possibility that the decision might be overturned by en banc ruling or reversal on certiorari does not overcome its practical effect, not just as an obstacle, but as the forerunner of the actual outcome. In the face of that, it is 'as a practical matter' a certainty that an absent party seeking a right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed knows the disposition in his absence will 'impair or impede his ability to protect that interest, * * *.' F.R.Civ.P. 24(a)(2)."[7]

7 379 F.2d 828, 829.

In Moore's Federal Practice, Second Edition, Vol. 4, pages 59, 60, §24.10, the author says: "The grant of intervention in many of the discretionary cases will facilitate the disposal in one action of claims involving common questions of law or fact, and thus avoid both court congestion and undue delay and expense to all parties. * * * The most obvious case of permissive intervention, of course, is the situation where an intervenor has a claim against the defendant similar to or identical with that asserted by the plaintiff."

In the case sub judice, aside from the original plaintiffs' claim that they are not subject to non-resident chancery attachment, because of Mississippi citizenship, the claims of NAACP are similar to or identical with those asserted by the original plaintiffs.

Rule 24(b)(2), F.R.Civ.P., provides: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." There is nothing present in the action sub judice which tends to show that the intervention of NAACP will unduly delay or prejudice the adjudication of the rights of the original parties.

The Court is of the opinion that permitting NAACP to intervene in the case sub judice, will avoid undue delay and expense to all parties.

In support of their motion to add MAP as a party defendant it is shown that MAP is a party defendant in the State Action. The same reasons that motivated the

Court to permit NAACP to intervene apply to the motion to make MAP a party defendant. Rule 19(a) F.R.Civ.P. provides "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest * * * If he has not been so joined, the court shall order that he be made a party."

Rule 21, F.R.Civ.P. provides "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

The Court is of the opinion that the motion of plaintiffs to make MAP a party defendant to this action is well taken and should be sustained.

It follows, as a matter of course, after permitting the intervention of NAACP, and directing that MAP be made a party defendant, that the Court should permit the filing of the amended complaint.

MOTION TO DISMISS

Defendants move the Court to dismiss the amended complaint on four grounds.

The first ground reasserts by reference the grounds set forth in the motion to dismiss the original complaint. The Court has previously overruled defendants' motion to dismiss the original complaint. The motion to dismiss the amended complaint for the reasons set forth in the prior motion does not present new or additional principles of law. The motion does not appear to be well taken on the first of the four grounds asserted by defendants.

The second ground asserts that the original complaint cannot be amended while the case is pending on appeal in the Court of Appeals from the Court's order of December 15, 1969, overruling defendants' motion to dismiss for failure of the complaint to state a cause of action. This question is now moot for the reason that on March 4, 1970, the Circuit Court of Appeals, refused to entertain the interlocutory appeal.

The third ground for the motion alleges that the attempted action on the part of the plaintiffs is in controvention of 28 U.S.C. §2283. The Court is of the opinion that this section is not applicable in the case sub judice.

The fourth ground is in effect, a motion to strike, and, in the opinion of the Court is not well taken.

It is the Court's judgment that the motion to dismiss is not well taken and should be overruled.

MOTION TO STRIKE COMPLAINT AND DISMISS ACTION

Defendants move the Court to strike the amended complaint and dismiss the action. In support of the motion defendants aver that they noticed the depositions of the individuals described in the amended complaint, as members of the class represented by plaintiff Aaron Henry, and that they willfully refused to appear at the time and place indicated and submit to the depositions. Defendants' motion is directed to the amended complaint in its entirety and does not seek to dismiss the same only as to the said individuals. Defendants argue that the individuals occupy the status of named plaintiffs and are subject to sanctions by the Court for failure to appear and submit to discovery depositions, without being subpoenaed as witnesses.

The plaintiffs contend that the individuals are members of a class represented by an individual plaintiff, Aaron Henry, and do not have the status of named plaintiffs so as to subject them to the discovery rules.[8]

Initially it is noticed that the motion to dismiss is general, and seeks dismissal, not only as to said individuals, but also as to the other plaintiffs who are not charged with failure to respond to discovery procedures. The willful failure of the eight individuals to appear for the deposition could not in any view of the matter justify the dismissal as to other plaintiffs. In the case of Demenlenaere v. Rockwell Mfg. Co., D.C. N.Y. 1959, 23 F.R.D. 686, the Court held that the failure of five of eight plaintiffs to appear for taking of their depositions would not justify dismissal as to all eight.

8 Rule 37(d) F.R.Civ.P. provides:
"Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

The Court has not determined that the action sub judice can be maintained as a class action on behalf of the individual defendants in the State Action. Rule 23(c)(1) F.R.Civ.P. provides "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained".

It is clear, therefore, that at this stage of the case, the individuals aforesaid are not parties to the action in any sense of the word. They are not named plaintiffs, and the Court has not determined by order that the action may be maintained as a class action for their benefit.

The Court is of the opinion that the motion to strike complaint and dismiss action is not well taken and should be overruled.

The Court has considered but declines to act at this time on the question of whether the said individuals, as

members of a class, should be considered in the same category as named plaintiffs for discovery purposes. In the present posture of the case a decision of the question is not necessary.

MOTION TO STAY TAKING OF DEPOSITIONS OF DEFENDANTS UNTIL DEFENDANTS HAVE COMPLETED DEPOSITIONS ON ORAL EXAMINATION OF PLAINTIFFS AND WITNESSES

When this motion to stay was filed the Court was of the opinion that the posture of the case was such that the taking of depositions on oral examination should be stayed until further orders of the Court, accordingly such an order was entered.

The position of defendants is that once they start taking depositions of the parties and other witnesses, they are entitled to proceed until they have concluded the examination of all parties and any other person known to have information concerning the issues involved in the litigation, and during this period the plaintiffs should not be entitled to proceed with discovery depositions in their behalf.

This seems to the Court as an impracticable position. Defendants might not conclude their discovery before trial. There is no known legal standard by which plaintiffs could determine when defendants conclude the taking of depositions, except to inquire of defendants. In such a situation plaintiffs would be at the mercy of defendants.

The record shows that defendants noticed the taking of depositions of the individuals above mentioned on January 16, 1970. Plaintiffs noticed the depositions of certain defendants on January 26, 1970. Defendants contend that having given notice of the taking of depositions first, they are entitled to proceed not only with the taking of the depositions of the individuals designated in the notice, but of all other persons whom they desire to depose. Such a procedure would produce absurd results.

The Court is of the opinion that the correct, proper and reasonable rule is stated in Moore's Federal Procedure, Second Edition, Vol. 4, §26.13(2) page 1151. Professor Moore states: "Also the party having priority is entitled to complete the taking of depositions *noticed* by him before the adversary party is permitted to institute discovery proceedings — depositions, interrogatories, or production of documents — of his own". (Emphasis supplied).

In the case sub judice defendants noticed the depositions of ten individuals at Clarksdale, Mississippi to begin on January 26, 1970, and to end on January 30, 1970. The notice was served on counsel for plaintiffs on January 16, 1970.

Plaintiffs noticed the deposition of six defendants for Clarksdale, Mississippi on February 2, 1970. The notice was served on January 20, 1970.

Thus, plaintiffs recognized the priority of defendants' depositions during the period of January 26, 1970 and January 30, 1970. This was all that plaintiffs were required to do under the priority rule. Defendants' priority extended only to the depositions already noticed by them.

The motion to stay depositions is not well taken and should be overruled. The parties should be left free to pursue discovery procedure as they desire, subject, of course, to compliance with the Federal Rules and principles of law applicable thereto.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs contend that the Court should preliminarily enjoin defendants from prosecuting the State Action because the trial of that action, while the case sub judice is pending, will effectively deprive plaintiffs of the opportunity of obtaining full and adequate relief in the case sub judice.

Plaintiffs support their motion with the contention (1) that the Court has jurisdiction of the action; (2) that plaintiffs' constitutional rights, particularly First Amendment rights, will be infringed by the State Action while this suit is pending; (3) that fundamental equitable considerations show that preliminary injunctive relief is appropriate, and (4) that 28 U.S.C.A. §2283 does not bar issuance of a preliminary injunction.

The parties have submitted elaborate and extensive briefs in support of their respective positions on this motion. The Court has given careful consideration to all points urged upon the Court.

The thrust of this action is the claim by plaintiffs that their First Amendment rights have been infringed by defendants by the utilization of the machinery of the state courts. This, plaintiff contends, satisfies the color of state law requirement.

Section 1331(a), Title 28 U.S.C.A. provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States".

Section 1343(3) Title 28 U.S.C.A. provides that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

Section 1983, Title 42 U.S.C.A. provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage,

> of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It was held by the Supreme Court in Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provisions of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In Edward v. Habib, 1968, 130 U.S. App.D.C. 126, 397 F.2d 687, 694, the court said:

> "A state court judgment, then, even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws."

In New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 697, 95 A.L.R.2d 1412, the Supreme Court said:

> "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court — that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See e.g., Alabama Code, Tit. 7, §§908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."

The Court is of the opinion that the amended complaint herein states a cause of action cognizable by the Court under 28 U.S.C.A. §§1331(a), 1343(3) and 42 U.S.C.A. §1983.

Defendants charge in the State Action that plaintiffs conspired each with the other to ruin and cause injury to the businesses of the defendants without any purpose of protecting or advancing any legitimate interest of their own. In carrying out this unlawful conspiracy,

defendants charge that plaintiffs daily committed malicious, illegal and unlawful acts of injurious falsehoods, deception, force, intimidation, threats, coercion and violence against the customers and prospective customers of defendants. Defendants charge plaintiffs with a secondary boycott of their businesses, maliciously contrived and executed, by coercing the customers of defendants, against their will, to withdraw and withhold their beneficial business intercourse from defendants, by the infliction or threat of physical injury to said customers and prospective customers, and by such intimidation as to place such customers and prospective customers in fear of injury and bodily harm.

The defendants also charge plaintiffs with massive picketing of their places of business; making public speeches against trading with defendants; stationing guards near their businesses to physically stop customers and prospective customers from entering the business premises of defendants and to threaten those who traded with defendants with physical violence; and with many other acts of violence or threatened violence toward customers and prospective customers of defendants, should they trade with defendants.

In sum, defendants charge plaintiffs with carrying into effect a boycott of their businesses, and forcing others to do the same, through picketing, speaking, violence and threats of violence.

As the result of the alleged conduct of plaintiffs, it is charged that defendants suffered large losses in the operation of their businesses for which they seek recovery against plaintiffs in a sum aggregating $3,542,466.04.

Defendants also charge plaintiffs with tortious interference with the rights of defendants to pursue their lawful trades and businesses and the violation of certain statutes of the State of Mississippi relative to restraint of trade. Defendants seek to restrain plaintiffs from picketing and boycotting their businesses and from violating certain Mississippi Statutes relative to restraint of trade.[9]

Defendants prayed for and obtained a non-resident Chancery attachment[10] of the funds of plaintiffs in fifty-six banks in Mississippi.

Plaintiffs contend that their activities consisted of picketing and boycotting and encouraging others to picket and boycott the businesses of defendants in protest of racial discrimination which had been and was being practiced by defendants in the operation of their businesses, and by the officials of the city in which defendants operated their businesses. Plaintiffs contend that their activities are constitutionally protected

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9 Mississippi Statutes which defendants claim were violated by plaintiffs include §§1088, 1089 and 1092, Mississippi Code 1942, Annotated, Recompiled.

10 Id. §2729 et seq.

by the first amendment, and that, as citizens of the United States, they have the right of the free expression of their views.

The State Action, plaintiffs contend, has a chilling effect upon their activities against which they are entitled to relief in this Court. Plaintiffs seek a preliminary injunction to protect their asserted rights until the case can be tried on its merits.

At the hearing on the motion for a preliminary injunction the Court accepted a copy of the sworn bill of complaint filed in the State Action in lieu of affidavits. This document sets forth the facts as have been hereinbefore enumerated.

The plaintiffs submitted the affidavits of eleven individuals, defendants in the State Action. The affidavits are similar. In substance the affidavits relate that the affiants have boycotted the places of business of the defendants, but have not threatened anyone else in regard thereto, nor have they been threatened in the matter; that they have no knowledge of violence or threats of violence to any other party; and that they have engaged in and encourage the boycott to support grievances which they feel are justified that those involved have discriminated and are discriminating against members of the Negro race.

The question presented to the Court on the motion for a preliminary injunction is whether the facts as shown by the sworn bill of complaint filed in the State

Court and the affidavits filed herein by plaintiffs present a case where the Court should exercise its injunctive power to maintain the status quo of the parties until the case can be heard on its merits.

There is little doubt but that the right of plaintiffs to peacefully picket and boycott the businesses of defendants and urge others to do so, is a right which they can enjoy, guaranteed to them by the first amendment. Amalgamated Food Employees Union, Union Local 590 v. Logan Valley Plaza, Inc., 1968, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Kelly v. Page, 5 Cir. 1964, 335 F.2d 114. The court said in *Kelly*, at page 119, as follows:

> "Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment to the Constitution, and made applicable to the states by the Fourteenth Amendment."

On the other side of the coin violence or threats of violence have no protection under the cloak of First Amendment Rights. In Smith v. Grady, 5 Cir. 1969, 411 F.2d 181, 188, 189, Judge Coleman speaking for the Fifth Circuit said:

> "This Court recognizes, as do all courts, that First Amendment rights are zealously to be protected. In fact, the decision of this case

turns chiefly on conduct, rather than speech. Of course, we take into consideration epithets addressed to customers and language which in all reason must be considered as insulting or threatening. At the same time, we are convinced that if peaceful picketing is allowable, as, for instance, not in the furtherance of an unlawful purpose, then a command of absolute silence is constitutionally impermissible.

* * * * * *

On a picket line, however, and particularly in the support of a boycott of a lawful business, the Constitution affords no protection to speech which is violent, threatening, menacing, insulting, or clearly calculated to provoke a breach of the peace by others."

The defendants contend, however, that 28 U.S.C.A. §2283 bars the prosecution of this action wherein the plaintiffs seek an injunction against the prosecution of a State Action.

It is provided in 28 U.S.C.A. §2283 that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

This section of the Code has been the subject of much litigation in recent years, and many decisions

have been rendered by appellate and district courts in the nation discussing the applicability of the statute and its scope.

However, the Court need not go further than the Fifth Circuit to dispose of this issue. In the case of Machesky v. Bizzell, 5 Cir. 1969, 414 F.2d 283, the court considered an action arising in the Northern District of Mississippi wherein plaintiffs sought injunctive relief against the enforcement of an injunction issued by the State Chancery Court. The Fifth Circuit, speaking through Judge Bell, said:

"Our decision is grounded on the premise that §2283 is non-jurisdictional in that it is no more than a statutory enactment of the principle of comity for application in the relationship between federal and state courts. As such, it is to give way in those extra-ordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights. The question, on this premise, becomes whether appellants alleged such a case."[11]

"We hold that the state court injunction here is unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues. We hold also that

11 414 F.2d 287.

> where important public rights to full dissemination of expression on public issues are abridged by state court proceedings, the principles of comity embodied in §2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights."[12]

The Court is of the opinion that the Court is empowered to enjoin the State Action, if the facts of the case justify it, to the extent that such State Action may violate the First Amendment rights of plaintiffs, as hereinbefore discussed.

The recital of the issues drawn in the State Action, hereinbefore contained, indicates to the Court that plaintiffs can legitimately claim that defendants seek to infringe upon their First Amendment rights, and the prosecution of the State Action will have a chilling effect upon the exercise of those rights. This appears to be a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained. Otherwise, plaintiffs will suffer irreparable injury on account of loss of First Amendment rights pending a solution of the differences between the parties.

The Court does not intend to and does not hold that plaintiffs may not be held to accountability in the State

12 414 F.2d 291.

Action for any conduct which is not protected by the first amendment, such as violent, threatening, menacing or insulting conduct, or such as is clearly calculated to provoke a breach of the peace by others.

MOTION FOR CHANGE OF VENUE

Defendants filed a motion for change of venue to the Southern District of Mississippi, asserting in essence that the convenience of the parties and witnesses justified and required such a change.[13] It is not controverted that practically all of the parties who may be affected by the outcome of this litigation, with the exception of the defendant banks, reside in the Southern rather than the Northern District of Mississippi. The scene of the action giving rise to the controversy between the parties is Port Gibson, Claiborne County, Mississippi. Port Gibson is situated in the Northern part of the Western Division (Vicksburg) of the Southern District of Mississippi. The Greenville Division of this Court is 115 miles and the Delta Division when the case sub judice is docketed, 185 miles from Vicksburg.

While the Vicksburg Division of the Southern District of Mississippi would be a more convenient forum for the parties and their solicitors, the trial of the case either at Greenville or Clarksdale would not, in the

13 The motion is apparently based on 28 U.S.C.A. §1404(a) which provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

opinion of the Court, create a great or excessive burden on the parties. Counsel for all parties in the case participate frequently in litigation before this Court at all of its division points.

Section 1404(a), Title 28 U.S.C.A., provides that "for the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought". Plaintiffs contend that they could not bring this action in the Southern District of Mississippi for the reason that the three original defendants are citizens of the Northern District of Mississippi. In support of their contention, plaintiffs cite the case of Hoffman v. Blaski, 1960, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254, in which the court said:[14]

> "A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. * * * But the power of a District Court under §1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff."

Plaintiffs brought this action against three banks as

14 363 U.S. 343, 80 S.Ct. 1089, 4 L.Ed.2d 1262.

representatives of a class of banks holding funds of plaintiffs, some of whom are residents of the Southern District of Mississippi. Plaintiffs contend that, for venue purposes, the residences of individual members of the class do not control, but only the residences of the named plaintiffs. Wright, Class Actions, 47 F.R.D. 169, 182 (1969). This argument does not impress the Court for the reason that plaintiffs could have selected a bank residing in the Southern District of Mississippi as the representative of the class against which to bring the suit. Thus, plaintiffs might have brought the suit in the Southern District of Mississippi.

Additionally, plaintiffs might have brought the suit in the Southern District of Mississippi because the claim arose in that district. Section 1391(b) Title 28 U.S.C.A. provides, "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law". It must be conceded that this claim arose in the Southern District of Mississippi. The transaction giving rise to the suit occurred in Port Gibson, Claiborne County, Mississippi. The State Action which precipitated this action was filed in the Chancery Court, First Judicial District, Hinds County, Mississippi, in the Southern District. Hence, the claim arose in the Southern District and the suit could have been brought in that district by virtue of Section 1391(b), supra.

The Court is of the opinion that Section 1404(a) supra, authorizes the transfer of this action to the Southern District of Mississippi, should the Court find that a transfer for the convenience of the parties and witnesses, or the interest of justice requires such that a change of venue be granted.

Whether a change of venue should be ordered is a matter largely within the discretion of the Court. Philip Carey Mfg. Co. et al. v. Taylor, 6 Cir. 1961, 286 F.2d 782, certiorari denied, 366 U.S. 948, 81 S.Ct. 1903, 6 L.Ed.2d 1242. Convenience of the parties will not alone justify a change of venue. The Court must be satisfied that a venue change will also be in the interest of justice.

The case sub judice was filed November 7, 1969. Defendants were made parties to the suit by order of the Court entered on November 17, 1969. Process was served on defendants on or about November 19, 1969. Defendants filed a motion to dismiss the action on December 1, 1969. This motion was overruled by the Court on December 15, 1969, and defendants were permitted to apply to the Circuit Court of Appeals for the Fifth Circuit for an interlocutory appeal. This was denied on March 4, 1969.

On December 15, 1969, plaintiffs filed a motion to add MAP as a party defendant in the action, NAACP filed a motion to intervene as party plaintiff, and plaintiffs filed an amended complaint. In the meantime the

Court entered a restraining order and a preliminary injunction against one of the original defendants, and members of the class represented by such defendant, directing the release of funds attached at the instance of defendants in their suit in the state court.

On December 30, 1969, defendants moved to dismiss the amended complaint, and on December 31, 1969, plaintiffs moved for a preliminary injunction to enjoin the prosecution of the State Action.

The motion for a change of venue was filed on January 6, 1970. Subsequent to the filing of the motion, the parties noticed discovery depositions, and thereafter defendants filed a motion to stay discovery depositions by plaintiffs and a motion to strike the amended complaint and dismiss the action, because of the failure of certain individuals, said by defendants to be parties to the action, to appear for depositions, when noticed to do so.

A hearing was held by the Court on all motions filed in the case on February 26, 1970, at which time affidavits and a copy of the sworn complaint filed by defendants in the State Action were filed with and considered by the Court on the motion for a preliminary injunction. The motions were argued before the Court and extensive and exhaustive briefs have been prepared by counsel and submitted to the Court for its consideration.

To grant a change of venue in the present posture of the case, in the opinion of the Court, would entail unnecessary expense and result in the waste of time on the part of all parties concerned. It does not appear, at this stage of the case, that the interest of justice will be served by the granting of the motion for a change of venue.

The motion for a change of venue will be overruled. The Court, however, reserves the right to give further consideration to the question as the case advances toward the trial date.

An appropriate order in line with the Court's holding will be entered in the case.

LIST OF INDIVIDUAL DEFENDANTS

Ferd Allen; Henry Anderson; Alonzo Atlas; Beatrice Atlas; Calvin Bailey; James Bailey; McLawrence Bailey; Joseph M. Barber; Kenneth C. Barber; Bill Beasley; Helen Beasley; Calvin Blackburn; Marjorie W. Brandon; Eli Brooks; Priscilla Brooks; Janie Brown; Tullos Brown; Eddie Burrell; James Burrell; Robert Butler, Jr.; Arthur Lee Camphor; Irma Rae Camphor; W. E. Camphor; Margie Clark; Albert Coleman; Charles Collier; James Collier; Alexander Collins; Geneva Collins; Thelma Crowder; Dan Currie (a/k/a Dan Curry); Sarah Jane Currie (a/k/a Curry); Charles Davis; Mack Louis

Davis; Mary Ella Dee; James Devoaual; Alex Dorsey; Sally Dorsey; Geneva Durham; Johnny Durham; Mary Durham; John Eggleston; Harvey Ellis; Jim Ellis, Jr.; John Ellis; Katie Ellis; Rachael Ellis; Charles Evers; Ethel Graise; James Gray, Walter L. Griffin, Sr.; Bernard Gusta; Leesco Gusta (Guster); Charlie Harris; Cline Harvey; Jim Holt; Albert Jackson; Willie Jackson; Mrs. E. J. Jennings; Jesse Johnson; Roscoe Johnson; Julia Coleman Jones; Lela Jones; Marcus Jones; Nathaniel H. Jones; Samuel Jones, Jr.; Bobby Kelly; Bernice Lee; Edward Lee; Margaret Liggan (Liggins); Clarence Lucas; Julia Lucas; Nathaniel Martin; Leander Monroe; Johnny Moore; Mary Lee Moore; Willie V. Moore; Ellis Neal; Bessie Newman; D. A. Newman; Amos Newsome, Jr.; James Odom; Leona Owens; Roosevelt Owens; William Owens; Henry Patton, Jr.; Henry Otis Preston; Evan Robertson; Viola Robinson; William (Willie) Robinson; Mary Ross; Odessa Ross; William M. Matt Ross; Elmo Scott; Rudolph Shields; Oliver Shinall; Dora Shorter; Roman Shorter; Rosa Shorter; Annie B. Smith; Bilbo Smith; Delores Smith; Leon Tarleton; Ira Thomas; Carl Thompson, Jr.; Marguerite Thompson; (Rev.) Mack Tisdale; George Henry Walker; Thelma K. Walker; Eddie Walls, Jr.; Lessie May Walls, Alex Warner; Alonzo Warner; Ethel Warner; Albert Weathers; Bome Wells; Carl Lee Wells; Eddie Lee Wells; Katie Wells; James Whitney; Calvin Williams; Ernestine Williams; Aaron Wilson; Gussie Pearl Wilson; (Rev.) Willie Wilson; Early Wren; Ruby Wren; Arthur Wyatt.

Supreme Court, U. S.
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No. 79-811

In the Supreme Court of the United States

OCTOBER TERM, 1979

CLAIBORNE HARDWARE CO., ET AL., PETITIONERS

v.

AARON HENRY, ET AL.,
UNITED STATES OF AMERICA, AND
MISSISSIPPI ACTION FOR PROGRESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions	2
Questions presented	2
Statement	3
Argument	9
Conclusion	21

CITATIONS

Cases:

Avco Delta Corp. Canada Ltd. v. *United States*, 484 F.2d 682, cert. denied, 415 U.S. 931	9
Blake Construction Co. v. *American Vocational Ass'n*, 419 F.2d 308	11
Citizens Co-Op Gin v. *United States*, 427 F.2d 692	9
Doran v. *Salem, Inn, Inc.*, 422 U.S. 922	17
Flagg Brothers, Inc. v. *Brooks*, 436 U.S. 149	12
Fuentes v. *Shevin*, 407 U.S. 67	11-12
Gibson v. *Berryhill*, 411 U.S. 564	16
Huffman v. *Pursue, Ltd.*, 420 U.S. 592	14
Judice v. *Vail*, 430 U.S. 327	14
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220	14, 18
Maricopa County v. *Valley National Bank*, 318 U.S. 357	10
Mitchum v. *Foster*, 407 U.S. 225	18

Cases—Continued — Page

Morrison Flying Service v. *Deming National Bank*, 404 F.2d 856, cert. denied, 393 U.S. 1020 9
Moore v. *Sims*, No. 78-6 (June 11, 1979) .. 14, 16
National Socialist Party of America v. *Village of Skokie*, 432 U.S. 43 16
New York Times Co. v. *Sullivan*, 376 U.S. 254 12-13
NLRB v. *Nash-Finch Co.*, 404 U.S. 138 .... 14, 18
North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 12
Shelley v. *Kraemer*, 334 U.S. 1 12
Sniadach v. *Family Finance Corp.*, 395 U.S. 337 12
Steffel v. *Thompson*, 415 U.S. 452 16
Trainor v. *Hernandez*, 431 U.S. 434 ..... 14, 19
United States v. *Alabama*, 313 U.S. 274 10
United States v. *Orleans*, 425 U.S. 807 10
Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 19
Younger v. *Harris*, 401 U.S. 37 .....3, 13, 14, 17

Constitution, statutes and regulations:

United States Constitution:

First Amendment 7, 16
Fourteenth Amendment 5, 7, 11, 12, 13

Headstart-Follow Through Act 42 U.S.C. 2921 *et seq.*:

42 U.S.C. 2921 8
42 U.S.C. 2922 10
42 U.S.C. 2928 ..... 2, 9

Constitution, statutes and regulations—Continued — Page

Miss. Code Ann.:

§ 11-31-1 (1972) 4
§ 11-51-3 (1972) 6
§ 11-51-31 (1979 Cum. Supp.) 6
§ 11-51-43 (1972) 6

28 U.S.C. 2283 .....3, 18, 20
28 U.S.C. 1291 16
42 U.S.C. 1983 .....4, 7, 11, 18, 19
45 C.F.R. Part 74 10
45 C.F.R. 74.134 10
45 C.F.R. 1301.3-3(a) 10
45 C.F.R. 1301.5-6(a) 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 595 F.2d 291. The opinion of the district court (Pet. App. 46a-57a) is reported at 424 F. Supp. 633. The previous orders of this Court denying certiorari (Pet. App. 67a) and denying rehearing (Pet. App. 68a) are reported at 405 U.S. 1019 and 406 U.S. 963. The previous opinion of the court

of appeals (Pet. App. 69a-95a) is reported at 444 F.2d 1300. The previous opinion of the district court (Pet. App. 102a-146a) is reported at 50 F.R.D. 251.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 21, 1979, and a timely petition for rehearing was denied on August 6, 1979 (Pet. App. 44a-45a). On October 20, 1979, Mr. Justice Powell extended the time for filing the petition for a writ of certiorari until November 25, 1979. The petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are reproduced at Pet. 4-7.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in finding that the United States is likely to succeed on the merits of its claim that it possesses a lien interest in funds distributed to one of the private respondents under the Headstart-Follow Through Act, 42 U.S.C. 2928.

2. Whether enforcement pending appeal of the state Chancery Court's judgment, which permanently enjoined respondents from protesting racial discrimination in Claiborne County, Mississippi, and held

respondents liable to petitioners for $1.25 million in damages, constitutes state action under the Fourteenth Amendment.

3. Whether the federal district court's preliminary injunctions, staying execution of the state court judgment pending review by the state appeals court, are barred by 28 U.S.C. 2283 or by the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971).

STATEMENT

1. In 1966, a group of black citizens in Port Gibson, Claiborne County, Mississippi, organized a boycott of white businesses in Claiborne County to protest racial discrimination by the merchants and by local public officials. The leaders of the boycott held public meetings and organized picketing, leafletting and solicitations to encourage black citizens to support the boycott. The boycott lasted several years, during which occasional threats of violence and violence occurred (Pet. App. 2a-3a).

On or about October 31, 1969, after the boycott had been in effect for several years, 23 white merchants of Port Gibson and Claiborne County filed suit in the Chancery Court of Hinds County, Mississippi, against the NAACP, a New York corporation doing business in Mississippi, the Mississippi Action for Progress (MAP), a nonprofit Mississippi corporation which operates the federal Headstart program in Mississippi, and 146 individuals. Alleging that the defendants had organized and conducted the boycott, and that the boycott violated Mississippi conspiracy,

antitrust, and secondary boycott laws, the complaint sought an injunction against all further boycott activity and $3.5 million in damages. Also named as defendants were 56 banks alleged to be holding deposited funds of the NAACP. Pursuant to a Mississippi statute authorizing prejudgment attachment of the assets of a nonresident debtor (Miss. Code Ann. § 11-31-1 (1972)), writs of attachment were subsequently served against the defendant banks without notice or a hearing. The attached funds ($16,324.94) were owned by the Mississippi State Conference of the NAACP and local branches of the NAACP in Mississippi (Pet. App. 3a-4a, 60a).

2. On November 7, 1969, the Mississippi State Conference and the Coahoma Branch of the NAACP (individually and on behalf of all other local branches) filed an action under 42 U.S.C. 1983 in federal district court, claiming that the attachment of their funds in the defendant banks violated their due process rights. The State Conference and Coahoma Branch argued that the state branches were legally independent of the national NAACP, were not named as defendants in the state action, and, as residents, were not subject to the nonresident attachment statute. The merchants were subsequently joined as defendants in the federal action (Pet. App. 4a-5a). On December 15, 1969, the federal court issued a preliminary injunction prohibiting any attachment of these funds and ordering their release upon payment of a bond (Pet. App. 97a-98a). These orders

were never appealed and remain in effect (Pet. App. 5a, 31a-32a).

On December 15, 1969, an amended complaint was filed in the federal action. The amended complaint named as additional plaintiffs the national NAACP, MAP, and the individuals named as defendants in the state court suit. The amended complaint challenged the constitutionality of the Mississippi statutes under which the state suit was brought and sought an injunction against further state court proceedings (Pet. App. 5). On June 9, 1970, the district court preliminarily enjoined the merchants from proceeding in state court (Pet. App. 140a). On appeal, the court of appeals held that the mere commencement of the private suit in state court did not constitute state action for purposes of the Fourteenth Amendment (Pet. App. 89a).[1] It accordingly ordered the amended complaint to be dismissed for lack of jurisdiction (Pet. App. 95a). At the same time, however, the court emphasized that the injunction entered by the district court on December 15, 1969—which barred interference with the plaintiffs' funds held in the defendant banks—remained in effect pending further action by the district court (Pet. App. 77a-81a).

3. On August 9, 1976, after an eight-month trial, the state Chancery Court found the NAACP, MAP,

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[1] The court distinguished the filing of a private action from the entry of a state court judgment, indicating that in the latter case state action would be present because at that stage the "full power of the state come[s] into play in enforcing the judgment" (Pet. App. 89a).

and the other defendants in that action liable to the merchants for $1.25 million in damages. Without giving consideration to the December 15, 1969, injunction of the federal district court, the state court directed the defendant banks to pay the attached funds to the merchants in partial satisfaction of the judgment. The court also permanently enjoined all picketing and other boycott-related activities designed to protest racial discrimination. The NAACP, MAP and the individual defendants promptly appealed the final decree to the Mississippi Supreme Court (Pet. App. 6a-7a).[2]

On September 24, 1976, the state defendants filed a motion in Chancery Court for a stay of the injunction and a stay of enforcement of the money judgment.[3] They argued that immediate enforcement of the injunctive decree, the money judgment, or the requirement that a supersedeas bond in the amount of $1.56 million be posted to obtain a stay of execution (see note 3, *supra;* Pet. App. 29a) would cause irreparable injury by depriving them of their constitutional rights under the First and Fourteenth Amendments and by forcing them into bankruptcy. The motion was denied without explanation by the Chancery Court and by the Mississippi Supreme Court (Pet. App. 7a).

[2] This appeal remains pending.

[3] Under Mississippi law, money judgments may be enforced immediately upon their entry by the trial court (Pet. App. 7a). See Miss. Code Ann. § 11-51-3 (1972). In order to obtain a stay of execution pending appeal, the appellant must post a supersedeas bond in the amount of 125% of the judgment. Miss. Code Ann. § 11-51-31 (1979 Cum. Supp.). An injunctive order may be stayed within the discretion of the trial court or the Supreme Court and may be conditioned upon such bond as the court may direct. Miss. Code Ann. § 11-51-43 (1972).

4. Having exhausted the available avenues for relief from immediate execution of the judgment in the state courts, the NAACP, MAP and the individual defendants then sought a preliminary injunction in federal district court against enforcement of the state court judgment pending appeal of that judgment to the Mississippi Supreme Court. On October 1, 1976, they filed a supplemental complaint alleging that the state court judgment conflicted with the injunction entered by the federal district court on December 15, 1969, and that enforcement of the state judgment would violate the plaintiffs' rights under 42 U.S.C. 1983 and the First and Fourteenth Amendments. In support of their allegations of immediate irreparable injury, the plaintiffs presented affidavits detailing the NAACP's precarious financial condition and the extent of its First Amendment activities (Pet. App. 8a). The affidavits, which have not been disputed, demonstrate that the NAACP could not post the $1.56 million supersedeas bond or pay the $1.25 million judgment without terminating virtually all of its national operations (Pet. App. 9a).

On October 7, 1976, the United States filed a motion to intervene as a party plaintiff in the federal action and joined in the motion for injunctive relief. The complaint alleged that the United States had a lien interest in federal funds granted to MAP pur-

suant to the Headstart-Follow Through Act, 42 U.S.C. 2921, and that these funds could not be subjected to state process without the consent of the United States. In support of the motion for preliminary relief, the United States alleged that interference with the Headstart program in Mississippi would cause irreparable harm to the needy children who receive food, medicine, and other services under that program (Pet. App. 8a).[4]

On October 20, 1976, the district court found that the plaintiffs would suffer immediate and irreparable harm if the court did not stay enforcement of the state decree pending appeal and concluded that all of the other requisites for preliminary relief also had been satisfied. Accordingly, the court issued three preliminary injunctions to prohibit the merchants from: (1) taking any action to enforce the state court decree pending exhaustion of appellate remedies; (2) acting under the state court judgment to seize any of the funds on deposit in the defendant banks; and (3) seizing any of the funds or property employed by MAP in the Headstart program (Pet. App. 58a-61a, 62a, 65a-66a).[5] On appeal, the court of appeals affirmed (Pet. App. 43a).

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[4] The United States also supported the arguments of the NAACP, asserting that a federal interest exists in the continued effective operation of the NAACP and other private civil rights organizations because of the important role they play in enforcing national civil rights legislation.

[5] The district court also ordered the federal plaintiffs to post security in the sum of $100,000 (Pet. App. 63a).

ARGUMENT

1. The courts below correctly concluded that the United States was likely to succeed on the merits of its claim that MAP's Headstart funds are subject to a federal lien interest. The district court, therefore, did not abuse its discretion in determining that injunctive relief was appropriate to preserve the status quo of these funds pending further proceedings.[6]

It is undisputed that the assets of MAP consist almost entirely of funds provided by the United States through "Project Headstart" and property purchased with such funds. Both the district court (Pet. App. 51a-52a) and the court of appeals (Pet. App. 38a-40a) examined the relationship between the United States and MAP established by the Headstart-Follow Through Act, 42 U.S.C. 2928, and correctly concluded that the United States' continued interest in MAP's federal grant funds met the criteria for creation of an equitable lien under *Avco Delta Corp. Canada Ltd.* v. *United States*, 484 F.2d 692, 703 (7th Cir. 1973), cert. denied, 415 U.S. 931 (1974); *Citizens Co-Op Gin* v. *United States*, 427 F.2d 692, 695 (5th Cir. 1970), and *Morrison Flying Service* v. *Deming National Bank*, 404 F.2d 856 (10th Cir. 1968), cert. denied, 393 U.S. 1020 (1969).

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[6] The court of appeals noted that "the United States has adequately demonstrated that it would suffer irreparable harm from the destruction of its Headstart grantee in Mississippi [which] provides food, medical and other services to roughly 5,000 needy children" (Pet. App. 40a).

Although private, nonprofit Headstart organizations such as MAP are independent contractors and not federal agencies,[7] detailed government regulations under the Headstart-Follow Through Act provide strict controls to ensure that Headstart funds are used exclusively for the narrow purposes specified by Congress, namely "the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families" (42 U.S.C. 2922). See 45 C.F.R. Part 74. In particular, these regulations provide that the United States retains a reversionary interest in all grant funds under the Act; moreover, all Headstart grantees are audited annually to ensure that they are complying with the Act and the implementing regulations. 45 C.F.R. 74.134, 1301.3-3(a), 1301.5-6(a).[8]

It is well established that the property of the United States cannot be subjected to state process without its consent. *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 362 (1943); *United States* v. *Alabama*, 313 U.S. 274, 281-282 (1941). This rule applies to equitable as well as legal interests in

[7] See *United States* v. *Orleans*, 425 U.S. 807 (1976).

[8] Contrary to petitioners' contention, the court of appeals did not hold "that so long as an entity receives some federal funding it cannot be sued without the government's permission" (Pet. 27). In finding an equitable lien, the court relied on the strict controls over expenditures of Headstart funds established by the Headstart-Follow Through Act and its regulations. The court of appeals emphasized that, under the regulations, "[t]he United States retains a reversionary interest in all grant funds and in all property purchased with such funds * * *" (Pet. App. 39a).

property. *Blake Construction Co.* v. *American Vocational Ass'n*, 419 F.2d 308, 311-312 (D.C. Cir. 1969). Since the United States has not consented to the destruction of its equitable lien in MAP Headstart funds, the district court properly enjoined petitioners from enforcing the state court judgment against MAP's funds or property. (Pet. App. 66a).

2. The remaining issues presented in the petition apply principally to the private respondents and only incidentally to the United States. See notes 9, 11, and page 18, *infra*. We nonetheless comment briefly on these issues.

a. Petitioner contends (Pet. 16) that the "mere entry of an enforcable state court judgment from which appeal lies as a matter of right is not 'state action' for purposes of the Fourteenth Amendment or 42 U.S.C. 1983."[9] But this statement of the question misconceives the subject of the federal injunction. The district court did not enjoin the "mere entry" of the state court judgment; rather, the district court enjoined *enforcement* of the state judgment pending appeal to the state supreme court. Plainly the enforcement of the state judgment by writ of attachment or execution would constitute "state action" for purposes of the Fourteenth Amendment (see *Fuentes*

[9] This contention is relevant only to the claims of the private respondents under 42 U.S.C. 1983; the United States' claim is based not on 42 U.S.C. 1983 but on its rights under the Headstart-Follow Through Act in the funds held in the defendant banks.

v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)) even if "mere entry" of the judgment would not.[10]

Moreover, as the court of appeals reasoned (Pet. App. 14a-15a), this Court's decisions in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), support the conclusion that the entry of a judgment that is immediately enforcible under state law itself constitutes "state action." In *Shelley* v. *Kraemer*, the Court held that judicial enforcement of a racially restrictive covenant in a deed constituted state action under the Fourteenth Amendment. Similarly, in *New York*

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[10] Petitioners' contention (Pet. 17) that the decision of the court of appeals conflicts with *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), is incorrect. In *Flagg Brothers*, the Court held that a creditor's private foreclosure sale did not constitute state action, even though the sale was authorized by state law. Unlike this case, *Flagg Brothers* did not involve judicial enforcement of a final decree. The Court in *Flagg Brothers* emphasized the difference between a creditor's private remedies and official remedies invoking judicial authority. 436 U.S. at 160-161 n.10. The Court distinguished cases such as *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), which had involved "overt [judicial] involvement" (436 U.S. at 157) either through court ordered process or state enforcement of the creditor's remedies. This case is analogous to *Fuentes* and *Sniadach*, rather than *Flagg Brothers*, because enforcement of the Chancery Court's judgment would bear "the clear and unmistakable imprimatur of the State" and would be "supported by the full panoply of state power." *Shelley* v. *Kraemer*, 334 U.S. 1, 19-20 (1948).

Times Co. v. *Sullivan*, in holding that a state court judgment in a common law libel suit constituted state action under the Fourteenth Amendment, the Court stated (376 U.S. at 265) (emphasis supplied; citations omitted):

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute. * * * The test is not the form in which state power has been applied but, whatever the form, *whether such power has in fact been exercised.*

In this case, the state trial court entered a final judgment, and an application for a stay of that judgment pending appeal was denied by the state courts. Because the defendants in the state action demonstrated that they would suffer irreparable injury if they were required to post the state-required supersedeas bond as a condition of a stay (see page 7, *supra*), the district court correctly concluded that the state judgment was sufficiently definite and concrete in its effect to have the characteristics of state action under this Court's reasoning in *Shelley*.

b. Petitioners contend (Pet. 11-16) that, under the principles of *Younger* v. *Harris*, 401 U.S. 37 (1971), the district court erred by issuing its injunc-

tions in this case.[11] In *Younger*, the Court held that a federal district court should not enjoin a pending state criminal prosecution in the absence of bad faith by the officials bringing the prosecution or great and immediate irreparable injury to the federal plaintiff. *Id.* at 46-49. The decision is based on the traditional reluctance of courts of equity to enjoin state criminal prosecutions (*id.* at 43-44) and on principles of comity and federalism, which counsel against undue interference with "the legitimate activities of the States" (*id.* at 44).

Although the Court has recently extended the *Younger* doctrine to certain types of state civil enforcement proceedings, it has thus far declined to apply the doctrine to all civil litigation. *Moore* v. *Sims*, No. 78-6 (June 11, 1979), slip op. 7 n.8; *Trainor* v. *Hernandez*, 431 U.S. 434, 444-445 n.8 (1977); *Judice* v. *Vail*, 430 U.S. 327, 336 n.13 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 607 (1975). In each of the civil actions in which this Court has held *Younger* to be applicable the state was a party to the proceedings and was seeking to promote or protect important state interests. Here, by contrast, as the court of appeals correctly recog-

[11] We do not understand petitioners to contend that *Younger* principles extend to the United States' request for injunctive relief. The court of appeals correctly concluded that additional considerations, including "frustration of superior federal interests," prevent application of *Younger* to the national government (Pet. App. 37a-38a). Cf. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 146 (1971); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226 (1957).

nized, *Younger* principles of comity and federalism are inapplicable because this case (Pet. App. 19a-20a)

> involves an exclusively private dispute to which the state has never been a party either in the state or the federal proceedings [and] does not represent a case where the state has undertaken the vindication of important state interests in a civil proceeding.

Moreover, even if the principles of *Younger* were applicable to this case, the relief granted by the district court would not be barred for essentially three reasons. First, the district court did not enjoin further state court proceedings but merely stayed execution of the judgment pending the exhaustion of preexisting state and federal appellate remedies. The only effect of the district court's injunctions was to preserve the status quo and protect respondents from irreparable injury until the respondents' substantial constitutional claims had been fully reviewed by the Mississippi Supreme Court and, if necessary, by this Court. The injunctions granted were carefully limited in both scope and duration to avoid interference with the decisional process of the state courts. Principles of comity and federalism are far less significantly implicated here than in cases where a federal court attempts to preclude a determination on the merits in an action or proceeding pending in state court.

Second, the district court granted its injunctive relief only after respondents had exhausted their state

remedies for a stay of execution of the state trial court judgment pending appeal. The issue before the district court—whether to stay execution of the state judgment—already had been decided adversely to respondents by both the Chancery Court and the Mississippi Supreme Court. The principles of *Younger*, which "counsels federal abstention when there is a pending state proceeding" (*Moore* v. *Sims*, *supra*, slip op. 6), are plainly less weighty when no further proceedings are available in state court on the federal claim. As this Court stated in *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974), "the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'" Because in this case there were no stay proceedings pending in the state courts at the time that the district court issued its injunctions, the court of appeals correctly concluded that "[a]s the federal plaintiffs had exhausted all avenues of emergency state relief available to them, * * * the *Younger* doctrine did not require the federal district court to abstain * * *" (Pet. App. 20a-21a).[12]

[12] Contrary to petitioners' suggestion (Pet. 14), a proceeding to obtain a stay of execution on a judgment properly is viewed as a separate, collateral determination apart from the main cause of action. See *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43 (1977) (denial of a stay pending appellate review is appealable as a collateral order for purposes of 28 U.S.C. 1291 and parties enjoined from their exercise of First Amendment rights are entitled to such a stay as a matter of right); *Gibson* v. *Berryhill*, 411 U.S. 564, 580 (1973) (principles of equity, comity and federalism do not warrant abstention by the federal court until state appeals are completed where the state agency continues to press charges without awaiting the outcome of the appeal). The fact that an appeal from the main action remains pending does not alter the fact that the state proceedings to obtain a stay have been exhausted.

Third, both the district court and the court of appeals found that the NAACP could not post the $1.56 million supersedeas bond or pay the $1.25 million judgment without having to terminate virtually all of its essential operations and that the other respondents would suffer similar irreparable injury (Pet. App. 29a, 56a). These findings establish the great and immediate irreparable injury that justifies federal court intervention under *Younger*. See 401 U.S. at 46-48. See also *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) ("[R]espondents alleged * * * that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless").[13]

[13] Petitioners contend that this case does not present any evidence of irreparable injury "because enforcement of the state court judgment can be stayed by respondents if they simply post a bond" (Pet. 15). But this simply ignores the findings of both the district court and the court of appeals concerning the irreparable injury that the bond requirement would cause (Pet. App. 29a, 56a). As the court of appeals stated, "a $1.56 million supersedeas bond (as required by Mississippi law) would effectively bankrupt the [NAACP] bringing all of its activities throughout the United States to an immediate and indefinite halt" (Pet. App. 29a).

c. The court of appeals correctly found that the orders entered by the district court were not barred by the anti-injunction statute, 28 U.S.C. 2283. Section 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This Court has recognized an implied exception to the statute when the United States seeks to stay proceedings in state court:

> The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.

Leiter Minerals, Inc. v. *United States*, 352 U.S. 220, 226 (1957). See also *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). The anti-injunction statute therefore did not bar the relief requested by the United States.

The private respondents' request for injunctive relief, brought under 42 U.S.C. 1983, is also not barred by the anti-injunction statute. 28 U.S.C. 2283 has an exception for injunctions "expressly authorized by Act of Congress * * *," and in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), this Court concluded that 42 U.S.C. 1983 is an Act of Congress "expressly authoriz[ing]"

federal injunctive relief in state court proceedings to protect federal rights. See also *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434, 444-445 n.8 (1977).

The court of appeals also concluded that the October 20, 1976, injunctions were permissible under the anti-injunction statute because they were necessary "to protect or effectuate" the district court's injunction of December 15, 1969, which had prohibited attachment of respondents' assets in various Mississippi banks (Pet. App. 33a).[14] Petitioners contend that this portion of the court of appeals' decision is in error on the theory that the December 15, 1969, injunction was dismissed on an earlier appeal when an amended complaint seeking a stay of the state court proceeding was dismissed (see page 5, *supra*). Because, as we have explained above, the anti-injunction statute is inapplicable to injunctions issued under 42 U.S.C. 1983, it is unnecessary to determine whether the statute is inapplicable for the additional reason that the challenged injunction was "to protect or effectuate" the December 15, 1969, injunction.

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[14] Petitioners also argue (Pet. 26) that the December 15, 1969, injunction never became effective because respondents failed to post a necessary bond. The court of appeals correctly concluded that the December 15 injunction required a bond to be posted only as a prerequisite to releasing the funds to the respondents (Pet. App. 31a, 97a). The portion of the injunction prohibiting the merchants "from subjecting or causing to be subjected in any way funds of [the] plaintiffs deposited in the defendant banks to attachment or other process" (Pet. App. 98a) was not conditioned upon posting a bond and therefore was effective at all times (Pet. App. 31a).

Moreover, the latter issue does not present a question of major importance justifying this Court's review. In any event, when the court of appeals ordered the amended complaint of December 15, 1969, dismissed on the prior appeal, the court expressly recognized the continued vitality of the December 15 injunction, stating that it "remains standing, pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim * * *" (Pet. App. 80a) and that it has not "been affected in any way by the subsequent orders of the district court" (Pet. App. 80a n.9). This conclusion was confirmed by the district court when it issued its October 20, 1976 injunctions (Pet. App. 47a-49a) and again by the court of appeals in its second opinion (Pet. App. 31a-33a). Reviewing the pertinent facts for a second time, the court of appeals stated: "Appellants' present contention that the amended complaint of December 1969 in all respects superseded the original complaint of November 1969 * * * is contrary to the clear understanding of this court and the district court regarding the separate status of the complaints and the orders based thereon" (Pet. App. 32a). The December 15, 1969, injunction thus remained in existence and, to effectuate that prior injunction, the orders of the district court challenged in this case were permissible under 28 U.S.C. 2283.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-811

CLAIBORNE HARDWARE CO., *et al.*,
Petitioners,
v.
AARON HENRY, *et al.*, UNITED STATES OF AMERICA, AND MISSISSIPPI ACTION FOR PROGRESS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AARON HENRY, NAACP, MISSISSIPPI STATE CONFERENCE OF NAACP, AND COAHOMA COUNTY BRANCH OF NAACP

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TABLE OF CONTENTS

	Page
Table of Authorities	I
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons For Denying the Writ	5
Conclusion	11

TABLE OF AUTHORITIES

CASES:

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	8
DeFunis v. Odegaard, 416 U.S. 313 (1974)	11
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)	9
Huffman v. Pursue, Ltd., 420 U.S. 592	6
Juidice v. Vail, 430 U.S. 327 (1977)	6
Moore v. Sims, 99 S.Ct. 2371 (1979)	7
National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)	7
New York Times v. Sullivan, 376 U.S. 254 (1964)	9
Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers Local 419, 397 U.S. 655 (1970)	11
Shelley v. Kraemer, 334 U.S. 1 (1948)	9
Trainor v. Hernandez, 431 U.S. 434 (1977)	6
Younger v. Harris, 401 U.S. 37 (1971)	6

CONSTITUTION AND STATUTES:

United States Constitution, Amend. I	2
28 U.S.C.	
§ 1254(1)	1
§ 1331(a)	2, 4, 10
§ 1343(3)	2, 4, 10

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C.	
§ 1983	2, 4, 10
Miss. Code Ann.	
§ 11-51-3	2, 3
§ 11-51-31	2, 3
§ 11-51-43	2, 3

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OPINIONS BELOW

The opinion of the court of appeals is reported at 595 F.2d 291 and is reprinted at 1a in the appendix to the petition (Pet. App.). The opinion of the district court is reported at 424 F. Supp. 633 and is reprinted at Pet. App. 46a.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing en banc was denied on August 6, 1979. After an extension of time was granted by Mr. Justice Powell, the petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the first amendment to the United States Constitution, 42 U.S.C. § 1983, and Miss. Code Ann. §§ 11-51-3 and 11-51-31, all appearing in the petition at 4-6, the following provisions are involved:

28 U.S.C. § 1331(a)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(3)

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Miss. Code Ann. § 11-51-43 (1972)

> In any case of an appeal to the supreme court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas.

STATEMENT OF THE CASE

On August 9, 1976, a Hinds County, Mississippi Chancery Court issued a broad injunctive order and damage award against numerous individual defendants and the

National Association for the Advancement of Colored People (NAACP) (respondents here) in a civil action filed by certain Mississippi merchants (petitioners here). The injunctive order prohibited the NAACP from engaging in any oral advocacy, picketing, or other boycott-related activities designed to protest racial discrimination. The damage award amounted to approximately $1.25 million. It was based on injuries alleged to have been caused to the merchants by the NAACP's previous boycott-related protests.

On August 30, 1976, respondents perfected their right to appeal the Chancery Court's injunction and damage award to the Mississippi Supreme Court. However, under Mississippi law trial court judgments become immediately enforceable upon entry. The Chancery Court's injunctive order could be stayed only at the discretion of the trial judge (or the Mississippi Supreme Court), and the damage award could be stayed only by the posting of a bond in an amount equal to 125% of that award. Miss. Code Ann. §§ 11-51-3, 11-51-31, 11-51-43. Accordingly, on September 24, 1976, respondents moved the Chancery Court, on both statutory and constitutional grounds, to stay its injunctive order pending appeal and to grant supersedeas either without bond or with reduced bond. Respondents contended that a failure to stay the judgments against them, pending appeal to the Mississippi Supreme Court, would irreparably injure their first amendment rights.

On September 30, 1976, the trial court denied respondents' motion. The next day, respondents appealed this denial to the Mississippi Supreme Court, where they again contended that failure to stay the lower court's judgment would deprive them of constitutionally protected rights before full appellate review could be obtained. The same day, the Mississippi Supreme Court denied relief.

On the day the Mississippi Supreme Court refused to stay the Chancery Court's injunctive and damage orders, respondent NAACP, on behalf of itself and the numerous individual defendants in the Chancery Court proceedings, sought relief from those orders in the federal district court for the Northern District of Mississippi. On October 1, 1976, that court issued a temporary restraining order, and on October 20, 1976, a preliminary injunction, each prohibiting petitioners from enforcing the Chancery Court's judgment pending its review by the Mississippi Supreme Court (and, if necessary, by the United States Supreme Court).

The district court's stay was issued pursuant to 28 U.S.C. §§ 1331(a), 1343(3) and 42 U.S.C. § 1983. It was based on the court's findings that certain portions of the state court's broad injunctive order were so sweeping as to raise serious questions about the injunction's constitutionality, that the Mississippi Supreme Court was likely to overturn these portions of the injunction on appeal and that, since the appeal might take two to three years to pursue, respondents would in the interim suffer irreparable injury to their first amendment rights. In addition, contrary to petitioners' assertion (at 20) that respondents have the "financial ability to post a supersedeas bond," the courts below found that either the execution of the $1.25 million judgment or the posting of the $1.56 million supersedeas bond would effectively bankrupt the NAACP and bring the further exercise of its first amendment rights to a virtual halt. Pet. App. 22a, 28a, 29a, 56a. Moreover, even if respondents had been able to post the supersedeas bond, it would have precluded execution only of the damage portion of the state court's judgment. A stay was required to prevent the immediate enforcement of the state court's injunctive order against respondents.

The stay granted by the district court was temporary and limited. It did not affect those portions of the state

court's injunction prohibiting violence, threats, or other coercion, but was restricted only to activities which the court found to be clearly within first amendment protections. It was conditioned on respondents' posting a bond of $110,000 to protect petitioners against any harm that the stay might cause them. Pet. App. 63a. Finally, as the court expressly noted, the relief granted to respondents "d[id] not contemplate interference with the proceedings in the state court" and was intended to last

> only for that period necessary to permit an exhaustion of appellate remedies. The final decree of the state court is now the subject of review by the [Mississippi] Supreme Court. The appeal has been perfected and the state court defendants have complied with the cost bond requirements fixed by the state court. The appeal will take its usual course through the state's appellate procedure and because of the complexity of the issues involved there will be several years involved in this process.

Pet. App. 50a. On May 21, 1979, the Court of Appeals for the Fifth Circuit unanimously affirmed the district court's decision. Pet. App. 42a-43a. The present petition followed on November 23, 1979.

REASONS FOR DENYING THE WRIT

Petitioners have asked this Court to review four questions which they contend are raised by the court of appeals' decision. The present respondents will address only three of these, since the fourth applies exclusively to another respondent, the United States.

As will be discussed, none of the three questions urged by petitioners is actually presented by this case. Moreover, even if the questions were squarely presented, petitioners have advanced no reason why this Court need consider them. Petitioners allege no conflict among the

circuits on these questions. They show no departure from this Court's decisions in the lower courts' resolution of the asserted questions, nor any justification for this Court to overrule its precedents which control those questions. They make no suggestion or demonstration that the peculiar facts giving rise to the questions will often, if ever, confront other lower courts. Finally, petitioners fail to consider that the questions, even if otherwise worthy of review, might well be mooted before they could be heard and resolved by this Court.

1. Petitioners first ask this Court to decide whether the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), applies to purely private civil actions. Even if that question merited review, it would be inappropriate to reach it in this case.

Younger and its progeny require the federal courts to refrain from enjoining certain state court proceedings "when litigation between the same parties and raising the same issues is or apparently soon will be pending" in those very proceedings. *Trainor* v. *Hernandez*, 431 U.S. 434, 440 (1977). A "necessary concomitant" of this requirement is that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court . . . ." *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 608 (1975). These requirements serve two essential purposes. The first recognizes that equitable intervention by a federal court is inappropriate where a party has an adequate remedy at law in a pending state court proceeding. The second, based on a respect for federal/state comity, assures that state courts in which federal issues are pending will be given an opportunity to hear and resolve those issues before resort is made to the federal courts. *Trainor* v. *Hernandez*, *supra*, 431 U.S. at 440-44; *Juidice* v. *Vail*, 430 U.S. 327, 334-35 (1977); *Huffman* v. *Pursue, Ltd.*, *supra*, 420 U.S. at 600-01; *Younger* v. *Harris*, *supra*, 401 U.S. at 43-44.

Petitioners request the Court to determine whether these *Younger* precepts apply to a case such as this, "a civil action between private parties in which the state is not a party." Petition at 3. On the facts presented here, the question is academic. Whether or not *Younger* applies to this case, its requirements were strictly observed and its purposes fully achieved. As both lower courts made clear, the sole issue entertained by the federal district court—whether the first amendment necessitated a stay of the Chancery Court's judgment pending appellate review—was in fact presented to the Chancery Court and thereafter appealed to the Mississippi Supreme Court. Pet. App. 7a-8a, 20a-21a, 55a. That is, the District Court's injunction issued only *after* exhaustion of every opportunity afforded by Mississippi for consideration of the questions raised by respondents' motion for the stay. Those questions are not the same as the issues on the merits of the pending state appeal. *See National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977). The federal court's treatment of the issue of the stay has neither usurped the Mississippi courts' authority to adjudicate the appeal on the merits nor interfered with those courts' proceedings concerning that appeal. Thus, *Younger* was strictly adhered to, and the question of its applicability to "all civil actions" does not arise.

Even if the asserted question was properly presented by this case, petitioners have suggested no reason why it should be considered. In most recent treatment of the *Younger* doctrine only six months ago, this Court declared that "we do not remotely suggest 'that every pending proceeding between a state and federal plaintiff justifies abstention . . . .'" *Moore* v. *Sims*, 99 S.Ct. 2371, 2377 n.8 (1979). Instead, the Court held that *Younger* applies only to those cases where important state interests are involved. *Moore* v. *Sims*, *supra*, 99 S.Ct. at 2377. No reason is offered why this Court should now consider abandoning that test, nor why this case is an appropriate

vehicle for such an abandonment. Neither do petitioners establish that an "important state interest" is at stake in this private civil litigation; to the contrary, as the court of appeals found, the only state interest present in this litigation is the minimal one which the state necessarily has in every civil action—providing "forums for the orderly resolution of private conflicts." Pet. App. at 20a. Furthermore, far from alleging any conflict in the circuits concerning the lower courts' application of *Younger*, petitioners assert at 11-12 that the lower courts have been uniform in their adherence to the test established by this Court. Petitioners' assigned question should not be entertained.

2. Petitioners next ask this Court to decide whether the "mere entry" of an appealable state court judgment constitutes "state action" for purposes of 42 U.S.C. § 1983. That broad question is simply not presented here. As the opinion below specifically explained, state action was involved here only because the Chancery Court's ruling, unlike most state lower court decisions, was immediately enforceable. Pet. App. 14a-15a; p. 3, *supra*. Had the district court not issued its injunction, state officials could have immediately begun enforcing the Chancery Court's injunction against activities protected by the first amendment and implementing garnishment or execution proceedings to collect the judgment from the NAACP and the individual defendants. Thus, petitioners' exaggerated "prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts" is unwarranted. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). Rather, as this Court has cautioned, the presence of state action "can be determined only in the framework of the peculiar facts and circumstances" presented in each particular case. *Id.* The peculiar facts involved in this case were characterized by the court

below as "unique," Pet. App. 15a, are unlikely to recur, and are not at all susceptible to the far-reaching issue petitioners present.

Even if this case fairly presented the assigned issue, petitioners have not shown that it should be reviewed. Petitioners do not attempt to demonstrate a conflict among the circuits, but claim instead that the ruling below conflicts with this Court's opinion in *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978). In fact, *Flagg* fully supports the decision below. There, this Court held that a warehouseman's proposed private sale of a customer's goods did not constitute state action because the actions of the private party in *Flagg* did not involve the direct authority or participation of the state. At most, the state did no more than decide *not* to act to interfere with a private party's use of a self-help remedy. *Id.* at 165, 166.

In contrast, as the decision in *Flagg* itself makes clear, the circumstances in this case do involve state action. Unlike the warehouseman in *Flagg*, petitioners did not simply employ "private means permissible under [state] law" against respondents. *Id.* at 160-61 n.10. Instead, petitioners have "invoked the authority of the [Mississippi] court" and the full law enforcement machinery of the state in an effort to enjoin respondents and to seize their funds. *Id.* This is precisely the type of activity repeatedly recognized by this Court to be state action. *Id.* *Accord*, *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Indeed, the holding in this case is more narrow than decisions such as *Shelley* and *New York Times*, both because of the particular factual circumstances involved in those cases and because, unlike *Shelley*, the state court here has not simply enforced private rights secured by contract, but has instead, as in *New York Times*, "applied a state rule of law which [respondents] claim to impose invalid re-

strictions on their constitutional freedoms." 376 U.S. at 265. Certiorari is not warranted concerning this issue.

3. In their final question directed toward the present respondents, petitioners ask the Court to decide whether an original complaint can "confer jurisdiction" on a court after a superseding complaint has been dismissed. Petition at 22. The stated question is not of sufficient significance to warrant certiorari. More importantly, it is not even presented by the lower court decision now before this Court. The preliminary injunction here under review was issued in October, 1976. Its factual basis was respondents' amended complaint of unconstitutional state action presented by immediate execution of the August 1976 Chancery Court judgment; its jurisdictional basis is 28 U.S.C. §§ 1331(a), 1343(3) and 42 U.S.C. § 1983. The question now raised by petitioners—the continuing validity of the "original complaint" in this case and a December, 1969 injunction based on that complaint—has no bearing on the stated factual and jurisdictional basis of the district court's October, 1976 injunction. Furthermore, petitioners' question was addressed and decided by the court of appeals the last time the parties were before that court. 444 F.2d 1300, 1305-06 & nn. 4-9 (5th Cir. 1971) (Pet. App. 77a-80a), *cert. denied*, 405 U.S. 1019 (1972). Petitioners have offered no reason why that settled question should now be reopened.

4. Finally, there is another reason why the writ should not be granted: there is a substantial chance that the assigned questions will be mooted before this Court could decide them. As the pleadings make clear, the judgment which was stayed by the district court is now before the Mississippi Supreme Court on its merits. Petitioners' appeal brief was filed with that Court on August 29, 1979; respondents' brief is due January 19, 1980. Should the Mississippi Supreme Court rule favorably for respondents, as both the district court and court of appeals have found likely, the district court injunc-

tion here at issue will expire. If that occurs, it seems doubtful that this Court could issue its own decision (after briefing and oral argument) before the injunction's validity is mooted by the impending decision of the Mississippi Supreme Court. In such circumstances, since this Court would in any event not pass on the validity of an injunction that had terminated or already served its purpose, *see DeFunis* v. *Odegaard*, 416 U.S. 312, 317-20 (1974); *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers Local 419*, 397 U.S. 655, 657-58 (1970), the writ should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1979, three copies of the foregoing Brief in Opposition of Respondents Aaron Henry, NAACP, Mississippi State Conference of NAACP, and Coahoma County Branch of NAACP were mailed by first class mail, postage prepaid, to:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-811

CLAIBORNE HARDWARE CO., ET AL.,
Petitioners,

versus

AARON HENRY, ET AL., UNITED STATES OF AMERICA, and MISSISSIPPI ACTION FOR PROGRESS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Aaron Henry, et al., in their opposing brief in No. 79-811, stated, "Petitioners allege no conflict among the circuits . . . ." (Br. in Opp., pp. 5-6). Petitioners invite the Court's attention to cases cited in their petition,

footnote 3, p. 11, and in particular the authorities cited from the Sixth Circuit. Upon review, these cases will reflect a split with other circuits on the applicability of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) to civil cases.

The United States, in its opposing brief in No. 79-811, rewrites the facts of this case, contrary to the findings of the state trial court after an eight month trial in which over 140 witnesses testified. This is evident from the following:

TRIAL COURT'S HOLDING:*	THE GOVERNMENT'S REVISION:
[1] "The overwhelming majority of . . . defendants . . . stated unequivocally that they had *no* dispute with any merchant." (Emphasis added) (App.[1] p. 165)	[1] "[A] group of black citizens . . . organized a boycott of white businesses . . . to protest racial discrimination by the merchants . . . ." (Br. in Opp. p. 3)

* From Final Decree, which incorporated its opinion.

1 Appendix to 76-4200, *Henry, et al. v. First Nat'l. Bank of Clarksdale, et al.* (Claiborne Hardware, et al.) reported at 595 F.2d 291 (5th Cir. 1979).

[2] "The thread of fear and violence is woven throughout this case. [The boycott was enforced by] fear . . . shootings . . . threats . . . harassment . . . beat[ings] . . . physical harm . . . villification and ostracism." (App. pp. 167-170)	[2] "[D]uring [the boycott] . . . occasional threats and violence occurred." (Br. in Opp. p. 3)
[3] "The funds attached . . . are declared to be the funds of the *nonresident* NAACP." (Emphasis added) (App. p. 210)	[3] "The attached funds were owned by the [*resident*] branches of the NAACP . . . ." (Emphasis added) (Br. in Opp. p. 4)

In addition, the United States argues that, "[T]he district court granted . . . injunctive relief only *after* respondents had exhausted their state remedies for a stay . . . pending appeal." (Emphasis added) (Br. in Opp. pp. 15-16). In fact, *before* the Mississippi Supreme Court ruled on Respondents' Petition for Stay (App. p. 228) their attorneys announced to the court that the federal district court had already granted a temporary restraining order.

These transparent revisions reflect respondents consistent reluctance to accept the findings of fact by the *only* court which has heard them. In light of the inability of respondents to face the issues presented in the petition without grossly distorting the facts, the need for plenary review of the action below is indisputable; indeed, petitioners suggest that summary reversal is now in order.

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